REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

EDWARD HALL ALDERSON, OF THE INNER TEMPLE, ESQRS.

BARRISTERS AT LAW.

VOL. III.

Containing the Cases of MICHAELMAS, HILARY, EASTER, and TRINITY
Terms, in the 60th of GEO. III. and 1st of GEO. IV. 1819, 1820.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET;
AND J. COOKE, ORMOND-QUAY, DUBLIN.

1820.

JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

Sir ROBERT GIFFORD.

SOLICITOR-GENERAL.

Sir JOHN SINGLETON COPLEY.

A TABLE OF THE NAMES OF THE CASES REPORTED IN THIS VOLUME.

Butler

Moore

Roe

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Sixtieth Year of the Reign of GEORGE III.

PROMOTIONS.

IN the course of this Vacation, Sir *Robert Gifford*, Knight, was appointed Attorney-General; and *John Singleton Copley*, one of His Majesty's Serjeants at Law, succeeded to the office of Solicitor-General, and was afterwards knighted.

BROUGHTON and Others *against* The COMPANY and PROPRIETORS of the MANCHESTER and SALFORD WATER-WORKS. *

Saturday, November 6th.

A corporation, not established for trading purposes, cannot be acceptors of a bill of exchange, payable at a less period than six months from the date; because such a case falls within the provision of the several acts passed for the protection of the Bank of *England*, by which it is enacted, That it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof: Quære, Whether any except a trading corporation can bind themselves as parties to a bill of exchange.

DECLARATION in assumpsit by the plaintiffs, as indorsees of a bill of exchange for 200*l.*, accepted by the defendants, and payable at three months from

* The Judges of this Court sat at *Serjeants' Inn*, on the 25th of *October*, and succeeding days, when this and several of the following cases were argued. See Vols. I. and II. p. 1.

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

the date. The defendants demurred generally to the declaration, and the plaintiffs joined in demurrer. The case was argued by

Campbell, in support of the demurrer. The defendants are created a corporation by a public act of parliament. The Court must therefore take notice, that this is an action of assumpsit against a corporation as, acceptors of a bill of exchange; but the action cannot be maintained, for the alleged acceptance is a nullity. The general rule is, that a corporation cannot contract unless by deed under the corporation seal. It lies upon the plaintiffs to shew, that the acceptance of a bill of exchange is an exception to the general rule, and that all corporations, for whatever purpose created, may be parties to a bill of exchange; but it is quite impossible, for this purpose, to take a distinction between a bill of exchange and a contract for the sale or purchase of goods, or any other simple contract, either by parol or in writing. The stat. 3 & 4 *Anne*, *c*. 9. *s*. 1., speaks of promissory notes made "by any person or persons, body politic or corporate, or by the servant or agent of any corporation;" and it may be admitted, that a corporation may as well be a party to a bill of exchange as to a promissory note. But the statute must be confined to the particular corporations, to whom the power of making promissory notes is expressedly or impliedly given. It might as well be argued, that an idiot or a feme covert may make a promissory note, because the statute mentions promissory notes made "by any person or persons." There are corporations with power to be parties to bills of exchange and promissory notes. The Bank of *England* and *East-India* Company are examples.

amples. "These corporations may, no doubt, accept bills of exchange by an agent; and they may, in consequence, be sued in assumpsit, as acceptors of these bills of exchange. In *Rex* v. *Bigg* (a), it is taken for granted, that such negotiable instruments may be issued by the Bank of *England*; and in *Edie* v. *The East-India Company* (b), no doubt is expressed that an action may be maintained against that corporation, upon bills of exchange which they have accepted. But the Bank of *England* is a corporation created for the express purpose of *banking*; for which purpose, it is indispensably necessary that the corporation should be enabled to draw and accept bills: and this power is recognised by a great variety of acts of parliament, viz. the 5 *W.* & *M.* *c.* 20., 6 *Anne*, *c.* 22. *s.* 9., 15 *G.* 2. *c.* 13. *s.* 5., and all the bank acts which have passed since. The 29th section of 5 *W.* & *M.* *c.* 20. makes bills under the seal of the Bank assignable; but this applies only to bonds or single bills, which would not otherwise have been assignable, leaving to the Bank the power of issuing bills of exchange which were assignable at common law. So, the *East-India* Company was expressly created to *trade* to the *East Indies*, and a power of *trading* is conferred upon the corporation; for which purpose, a power to draw and accept bills is indispensably requisite. This power is likewise recognised and regulated by many acts of parliament, viz. 9 and 10 *W.* 3. *c.* 44., 21 *G.* 3. *c.* 65. *ss.* 26, 27., 33 *G.* 3. *c.* 52. *s.* 109., 53 *G.* 3. *c.* 155. *ss.* 57, 58. But the defendants are only a corporation for supplying the towns of Manchester and Salford with water; and as no express power is given to them to

(a) 3 *P. W.* 419. *Str.* 18. (b) 2 *Burr.* 1216. 1 *Black.* 295.

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

draw or accept bills, so no such power can be considered impliedly conferred upon them, as it is entirely foreign to the purpose for which the corporation is established. On the contrary, the act points out a specific mode of raising money for completing the undertaking, by bonds under the corporation seal. In *Slark* v. *The Highgate Archway Company* (*a*), the Court of Common Pleas intimated a clear opinion, that a corporation cannot be liable on a bill of exchange, unless a power to draw and accept bills of exchange be directly or indirectly vested in them. Another objection to the validity of the bill now sued upon is, that although accepted by a corporation other than the Bank of *England*, it is payable at less than six months from its date. The issuing of such a bill is forbidden by 6 *Anne*, *c.* 22. *s.* 9.; and the same clause for preserving the monopoly of the Bank of *England*, is introduced into all the subsequent acts renewing the charter of that corporation.

Abraham, contrà. A corporation may be parties to a bill of exchange; and 2d, they are liable, in such case, to be sued in assumpsit. The 8 and 9 *W.* 3. *c.* 20. *s.* 28. only enacts, that there shall be no corporation *in the nature of a bank*, during the continuance of the Bank charter. By the 6 *Anne*, c. 22. *s.* 9., the above provision is recited; and in the preamble to that section, it is further recited, that divers corporations and other persons have presumed to borrow money, and do deal *as a bank*, contrary to the said act; and then it enacts, that no corporation, or more than six persons in partnership, shall borrow, owe, or take up any money, on their bills or notes payable at demand, or at less than

(*a*) 5 *Taunt.* 794.

six

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

x months from the borrowing. The 15 *G.* 2. *c.* 13. *s.* 5. is expressed to be passed in order to prevent any doubts that might arise concerning the privileges and power given by the former acts to the Bank of *England*, and it confirms the enactment of the statute of *Anne*. The 21 *G.* 3. *c.* 60. *s.* 12., which was passed also for the purpose of preventing doubts with respect to the privileges of the Bank of *England*, enacts, that it is the true intent and meaning of that act, that *no other bank* shall be allowed or established by parliament; and that it shall not be lawful for any body corporate, or for any other persons in covenants or partnership exceeding six, to borrow, owe, or take up any money on their bills or notes payable at demand, or at any time less than six months from the borrowing thereof. Now, from these acts, it appears that all corporations (except those prohibited by them) might become parties to bills of exchange or promissory notes. The case of *Wigan* v. *Fowler* (*a*) is an authority to shew that the prohibition in those acts extends only to banking companies. An action was there brought against seven defendants, on a note payable at three months. It was objected that the note was void by the bank acts. Lord *Ellenborough* held at nisi prius, that those acts extended only to bankingc ompanies; and that decision was confirmed afterwards by the Court, on a motion for a new trial. And in *Slark* v. *Highgate Archway Company* (*b*), this act was considered by *Gibbs* C. J. as merely directory, and therefore as not avoiding the note in the hands of an innocent indorsee. It appears, from the 3 and 4 *Anne*, c. 9. *s.* 1., that, at common law

(*a*) 1 *Starkie*, 459. (*b*) 5 *Taunt.* 792.

 a cor-

1819.

Broughton
against
The Manchester Water-Works Comp.

a corporation might be parties to bills of exchange. That statute was passed for the purpose of putting promissory notes on the footing of bills of exchange, and enacts, that an action may be maintained upon them, as upon an inland bill of exchange made and drawn by a *body politic* or *corporate*. This statute, therefore, is a legislative declaration, that, prior to that time, a corporation might be parties to a bill of exchange. Now, this corporation is established for the purpose of supplying the inhabitants of a particular place with water: the act says nothing, one way or the other, on the subject of bills of exchange, and therefore the general rule of law must prevail, and consequently these defendants were capable of binding their funds by a bill of exchange. Then, if so, they are liable in assumpsit. [*Bayley* J. If this corporation were in a situation to become acceptors of a bill of exchange, it follows, as of course, that they are liable in assumpsit; that being the proper remedy on a bill of exchange.] The 3 and 4 *Anne*, *c.* 9. *s.* 1., affords a strong argument on that point; and he cited 6 *Vin.* 317. *pl.* 49., *Rex* v. *Bigg* (*a*), *Yarborough* v. *Bank of England* (*b*), *Edie* v. *East-India Company*. (*c*)

Campbell, in reply, observed, that the case of *Wigan* v. *Fowler* was easily distinguishable from the present, as the fact that the partnership of the acceptors consisted of more than six persons, did not there appear upon the face of the bill, and was unknown to the plaintiff, whereas this bill, on the face of

(*a*) 3 *P. Wms.* 419. 1 *Stra.* 18. (*b*) 16 *East*, 6.
(*c*) 2 *Burr.* 1216. 1 *Black.* 295.

it, is directed to and accepted by a corporation created by a public act of parliament. Therefore the present plaintiffs must be presumed to have known, that the instrument was illegal and void, when it was first indorsed to them.

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

ABBOTT C. J. It is not necessary for me to enter into the general question, whether an action of assumpsit will in any case lie against a body corporate, for I am of opinion that this case falls within the provisions of the several acts of parliament made for the protection of the Bank of *England*. The statute by which the Bank was established as a company contains a provision, "that it shall not be lawful for any body corporate to borrow, owe, or take up any sum of money on their bills, or notes payable at demand, or at any less time than six months from the borrowing;" and that clause has been incorporated into all the subsequent acts relating to the Bank of *England*. It seems to me, that by the fair interpretation of that statute, the words "owe on a bill of exchange" are applicable to those who are liable as acceptors, for such persons are debtors on the bill. In the case of the bankruptcy of an acceptor, the holder of the bill proves the amount as a debt under the commission, and makes an affidavit, that the bankrupt is indebted upon the bill, viz. that he owes the money upon the bill. It seems to me, that we should be defeating the object of the statutes, if we were to hold, that the *Manchester* Water-works Company could bind themselves by the drawing of bills of exchange, or by the issuing of promissory notes. This case is very distinguishable from

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

Wigan v. *Fowler.* (*a*) There it did not appear, on the face of the instrument, that the security was made by more than six persons; here it appears that the bill was accepted by a corporation: we are bound, therefore, to give effect to the prohibition in the act of parliament, and to say that the defendants, as a corporation, are not entitled to draw, or accept bills of exchange of this description.

BAYLEY J. The act of parliament, by which this corporation is established, does not contain any express power by which they are enabled to become parties to bills of exchange or promissory notes, nor is there any thing in the purpose for which this corporation was established, from which it is to be implied, that such a power was meant to be given. It seems to me, that the drawing of bills of exchange was quite foreign to the purpose for which this corporate body was established, which was for the erecting and carrying on water-works in a particular place. There being no power expressly given to them to make promissory notes, or to become parties to bills of exchange, I should doubt very much, (even if the bank acts were entirely out of the question,) whether such a corporation would have any power so to bind themselves for purposes foreign to those for which they were originally established. But without determining that point, this case seems to me to be clearly within the prohibition of the several acts passed for the protection of the Bank of *England*. It was the object of the legislature, that they, as a trading company, might apply the money lodged in their hands in negociating bills of exchange, and ad-

(*a*) 1 *Starkie*, 459.

vancing

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

vancing the money on government securities; now the statutes of the 6 *Anne*, c. 22. s. 9., the 15 G. 2. c. 13. s. 5., and the 21 G. 3. c. 60. s. 12., expressly prevent all other corporations from owing money on bills of exchange or promissory notes, payable at a less period than six months after date; and the words of the 21 G. 3. c. 60. s. 12., are these, "that it shall not be lawful for any body corporate, or for any persons united in partnership, exceeding the number of six, to borrow, owe, or take up any money in their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof." The object of the legislature was not to prevent other corporations from borrowing money on promissory notes or bills of exchange, but only to prevent them taking up money on bills or notes, of such a description as might come in competition with those of the Bank of *England*. That corporation issues notes payable on demand, and discounts bills at short dates. The accepting of bills, or the issuing of promissory notes, payable at such short dates by other corporations, would infringe upon the exclusive privileges given to the Bank of *England* by the legislature. The case of *Wigan* v. *Fowler* is distinguishable from the present, inasmuch as it did not there appear on the face of the bill to be accepted by more than six persons. Here, upon the face of the instrument, the acceptance appears to be by a corporation, and all corporations are prohibited from owing any money on a security of this description, unless it has more than six months to run. I think, therefore, that this is the case of a corporation owing money upon a bill of exchange within the meaning of the acts of parliament, and consequently that this action cannot be supported.

HOLROYD

Holroyd J. I am of the same opinion. The case of *Wigan* v. *Fowler* is very distinguishable from the present case. There the number of the defendants did not appear upon the face of the note; there was nothing, therefore, on the face of that note which shewed it to be a note prohibited by the 15 *G.* 2. *c.* 13. That statute prohibited any body corporate, or any other persons in partnership, exceeding six, from borrowing, owing, or taking up any money on their bills or notes, payable at demand, or at any less period than six months from the borrowing. The note in the case cited did not appear to be illegal on the face of it: for the action was brought by an indorsee, who was not privy to the fact, that it was made by more than six persons, or that it was a note within the prohibition of the statute. The statute does not expresly make such a bill void; if it did, it would (as in the case of usury or gaming) be void in the hands of an innocent holder, although the defect did not appear on the face of the instrument. I take it to be clear, however, that where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, there, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person. I think, therefore, that as the statute here does not expressly avoid the security, the bill of exchange, under the circumstances stated in *Wigan* v. *Fowler*, would not be void in the hands of an innocent holder. But here the defendants are made a corporation by a public act of parliament, and every person is bound to take notice of that [illegible]; and when there-

1819.

BROUGHTON against The MANCHESTER Water-Works Comp.

fore, a holder of a bill, though a bona fide indorsee, takes the defendants' acceptance, he must know that they are a body corporate; and he therefore receives it, knowing it to be the acceptance of a corporation prohibited from owing money on such a bill: he is not, therefore, an innocent indorsee, because he takes a bill which he knows to be prohibited by statute; and that distinguishes the case from the case of *Wigan* v. *Fowler*, where the names of all the seven persons did not appear on the face of the bill, and the plaintiff did not know it to be a bill prohibited by the statute. Here, however, the plaintiff took a bill of exchange, which he knew to be one prohibited by statute, and he cannot, therefore, recover upon that bill. Consequently, there must be judgment for the defendant.

BEST J. I am of opinion, that the objection ought to prevail on both grounds. This comes within the statutes for the protection of the monopoly of the Bank of *England*: for it is impossible to say that the defendants do not owe money on the bill, and the legislature has said that no corporation shall owe money on a bill, unless that bill has six months to run. The party who took this bill knew it had not six months to run, he knew it was the acceptance of a corporation; he must be taken, therefore, to have known, that he took a security which was prohibited by statute; and he has, therefore, no right to complain, if he cannot now recover upon it. It appears to me, that if this objection were not to prevail, any company established even for limited objects might erect themselves into a banking company; for what is to restrain them from engaging in banking to any extent, if they can raise money by accepting

1819.

BROUGHTON *against* The MANCHESTER Water-Works Comp.

cepting bills of exchange or issuing promissory notes. I am also of opinion, on the other ground, that this action is not maintainable, because this case comes within that rule of law by which corporations are prevented from binding themselves, by contract not under seal. When a company like the Bank of *England*, or *East-India* Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporatad, that they should have power to accept bills or issue promissory notes: it would be impossible for either of these companies to go on without accepting bills. In the case of *Slark* v. *The Highgate Archway Company* (*a*), the Court of Common Pleas seemed to think, that unless express authority was given by the act establishing the company, to make promissory notes eo nomine, a corporation could not bind itself except by deed. Now there is nothing in the act of parliament establishing this company, which authorizes them to bind themselves, except by deed. The company, too, was not created for the purposes of trade, but merely to carry on the business of supplying the inhabitants of a particular place with water. Now it cannot be necessary, for this purpose, that they should become the makers of promissory notes or the acceptors of bills of exchange. As, therefore, the nature of the business in which they are engaged does not raise a necessary implication, that they should have the power to accept bills; and as no authority is expressly given by the act of parliament for that purpose I am of opinion, on this latter ground also, that this action cannot be maintained.

Judgment for Defendants.

(*a*) 5 Taunt. 792.

1819.

VAN SANDAU *against* CORSBIE and Another.*

Saturday, November 6th.

By the 49 *G.* 3. *c.* 121. s. 8., the certificate of a bankrupt is a bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by the bankrupt of the original debt, when due; and therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar.

DECLARATION stated, that in consideration that plaintiff, for the accommodation, and at the request of defendants, would accept a certain bill of exchange, drawn by the defendants on plaintiff, by which defendants required plaintiff, four months after the date thereof, to pay to the order of defendants 1021*l.* 5*s.* 6*d.*, and would deliver the same so accepted to defendants, in order that defendants might negotiate the same for their own use and benefit, defendants undertook to provide him money for the payment of the said bill of exchange, when the same should become due and payable. It then stated, that plaintiff did accept the bill, and deliver it so accepted to the defendants; and that although the bill was negotiated by defendants for their own use, and has long since become due and payable, yet that defendants did not provide the money, in consequence whereof plaintiff was sued by the holder of the bill, and was forced to pay 30*l.* for the costs of an action, and to give a cognovit for the amount of such bill; and that when the amount became due, he was obliged to sell his estate and interest in a wharf at *Rotherhithe*, for the purpose of procuring the means of paying the money due on the bill; by reason whereof, plaintiff hath not only been put to great expences of monies, but hath suffered great anxiety of mind, and hath been greatly injured in his circumstances and credit, and greatly damnified, by reason of his having been obliged to sell and dispose of his said wharf.

* This case was argued at *Serjeants' Inn.*

Plea,

1819.

VAN SANDAU *against* CORSBIE.

Plea, after stating the trading of defendants, the petitioning creditor's debt, the issuing of a commission, under which they were declared bankrupts, their surrender on the 27th *January*, 1816, and the obtaining of their certificate on the 19th *July* following, which was duly allowed by the Lord *Chancellor*, stated, that before the issuing of the commission, and before the defendants had committed any act of bankruptcy, the plaintiff had become liable for a debt of the defendants, upon the bill of exchange in the declaration mentioned, which had been drawn by the defendants and accepted by the plaintiff for their accommodation; and that such bill had been negotiated by the defendants, and at the time of the issuing of the commission remained in the hands of their creditors; and that before any dividend was made under the commission, the plaintiff being so liable after the issuing of the commission, paid the debt for which he was so liable to the holder of the bill; and that the creditor, who had not proved his debt under the commission, might receive under the commission a dividend in proportion to his debt, without disturbing any dividends already made. To this plea the plaintiff demurred, and assigned for cause, that it did not appear that the causes of action in the declaration mentioned were debts proveable by the plaintiff, as a creditor of the defendant under his commission; and also that it did not appear, the causes of action being uncertain and unliquidated, that the damages could have been proved under the commission. The defendant joined in demurrer, and the Court of Common Pleas, after argument, gave judgment for the defendants. A writ of error was then sued out, and the plaintiff in error assigned for error the same

causes

causes as were assigned below on the demurrer. The case was argued before this term, at the sittings at *Serjeants' Inn*, by

1819.

VAN SANDAU *against* CORSBIE.

F. Pollock, for the plaintiff in error. This action is brought, not to recover the money paid on the bill, but for the consequential injury arising to the plaintiff from his not having been provided with funds to pay the bill when due, and the damages are the costs incurred in defending an action, and the loss sustained by plaintiff's having been compelled to sell an estate, in order to raise money to pay the bill. Those damages are unliquidated, and, consequently, were not capable of proof under the commission. The 49 *G.* 3. *c.* 121. *s.* 8. enables a surety, or person liable for the debt of the bankrupt, who has paid the debt after issuing the commission, to prove his demand, in respect of any payment made on account of such debt. That act, therefore, would only enable the plaintiff to prove his debt for the amount of the bill, which forms no part of the subject of this action. Where a loan of money is general, the damage resulting from the non-payment is merely the principal and interest; but where there is an express undertaking to pay on the happening of a particular event, or at a particular time, the non-payment of the money, according to the contract, may produce to the lender damages much beyond the principal and interest: if the lender be a trader, it may prove ruinous to his credit. There is no distinction in point of principle between a contract to provide money at a given time, and a contract to provide goods. In the latter case, the damages are usually measured by the difference of price, but that is not always the fair measure

1819.

VAN SANDAU *against* CORSBIE.

measure of the damage: for if a party contracting for the delivery of goods at a specific day were bound to provide government with those goods, and on default to pay a sum of money, by way of stipulated damages, the damages for the breach of a contract with him might be co-extensive with his liability to government; and it could not be contended, in such a case, that that consequential damage could be the subject of proof under a commission of bankrupt. In *Stedman* v. *Martinnant* (a), the Court held, that the money paid by the acceptor of an accommodation bill might be proved under a commission against the drawer, but the action there was brought merely to recover the money, and not any consequential damage from the acceptor not being provided with funds to pay the bill when due.

Parke, contrà. By the 49 G. 3. c. 121. s. 8. it is enacted, that where any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such surety, or person liable, if he shall have paid the debt, although after the commission issued, to prove his demand in respect of any payment made on account of such debt, as a debt under the commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt, after an act of bankruptcy had been committed by such bankrupt; and then it goes on to state, that every person who has obtained his certificate should be discharged of all demands at the suit of every person having so paid, or being enabled to prove, with regard to his debt in respect of such suretyship or liability, in like

(a) 13 East, 427.

1819.

VAN SANDAU *against* CORSBIE.

manner as if such person had been a creditor before the bankruptcy. Now the certificate of the bankrupt, to which some portion of the creditors (who are empowered to bind the whole) are parties, operates as a statutory release; and the statute having directed that the certificate, in this case, should be a discharge of all demands at the suit of the surety, with respect to his debt, it may be here considered as a release of all demands with respect to the debt. In *Sheppard's Touchstone*, 338., it is laid down, that a release of all demands releases all manner of *actions* real and personal, debts and *duties*. By this statutory release, therefore, all actions and duties in respect of the debt are released, and, consequently, the action resulting to the plaintiff from the defendant's breach of duty, in not providing him with funds to pay the bill when due, is also released. The case of *Wood* v. *Dodgson* is an authority expressly in point. There *Wood* and *Dodgson* (a), having been partners, dissolved their partnership by deed, and *Dodgson* covenanted to pay all the partnership debts. After this *Wood* was sued by the holder of a bill of exchange, accepted by the partnership, and he paid a sum of money for principal, interest, and *costs*, and then brought an action of covenant against *Dodgson*, to recover the sum so paid. The defendant there pleaded his bankruptcy specially, and this Court held, that his certificate was a bar to the action. He was then stopped by the Court.

ABBOTT C. J. That is quite decisive of this case. Here the principal ground and cause of action, suppos-

(a) 2 *M. & S.* 195.

1819.

VAN SANDAU *against* CORSBIE.

ing the statute 49 *G.* 3. had never passed, is the recovery of a sum of money paid by the plaintiff as acceptor upon the bill, and if an action had been brought, he might not only have recovered that money, but, perhaps, also the special damage which he had incurred, in order to raise money to pay the bill. That damage, however, could only have been recovered as an accessory to the principal debt; this is a novel attempt to separate the accessory from the principal; and it seems to me, that, in point of law, that cannot be done. If we were to give effect to this action, we should, in a great measure, defeat the object of this very beneficial statute, which was intended to relieve the bankrupt from all claims of the surety, arising out of the original debt.

BAYLEY J. I am of the same opinion. If the statute of the 49 *G.* 3. had never passed, if the plaintiff had been arrested upon the bill, and in order to pay it he had sold his estate at a loss, he could not then have brought two separate actions, first for the money which he had paid, and secondly, for the special damage which he had sustained by the sale of the estate. The plaintiff here is a surety; now the 49 *G.* 3. enables the surety to prove his demand in respect of such payment, as a debt under the commission; and then it enacts, that the bankrupt shall be discharged of all demands at the suit of the surety, in regard to his debt, in respect of such suretyship; now it seems to me, that under this clause of the act, the certificate is a bar not only to any claim for the money which constituted the original debt, but a bar also to any demand for accessory injuries arising out of the debt, and which accessory injuries could only be the subject of the same

action

1819.

VAN SANDAU *against* CORSBIE.

action brought by the plaintiff to recover the money. In my judgment, the statute makes the certificate not only a bar to the principal debt, but also to any consequential damage arising from that debt not having been duly paid. If this were not the proper construction of the statute, I cannot see why any creditor of a bankrupt subsequently to the *5 G. 2.*, who had incurred special damage, in consequence of having been arrested, or of having been bound to pay costs, should not have brought an action for such consequential injury: but no such action was ever heard of; and with respect to costs it has been decided, that they are in the nature of an accessory, and that when the right to the principal is barred, the right to the accessory is barred also. (*a*) If that be so, there does not seem to be any distinction in principle between an arrest which is a restraint on the person, and the payment of costs, which is a restraint on the purse. I think that this declaration attempts to sever that which is not severable in point of law, and I think, therefore, that the judgment of the Court of Common Pleas ought to be affirmed.

HOLROYD J. I am of the same opinion. Where the right to the principal debt is barred by statute, the right to damages, which are accessory to and consequential on that principal debt, is also barred. The obligation entered into by the defendant, as stated in this declaration, was to provide the plaintiff with money to pay the bill when it became due, and if the defendant had not become bankrupt, the plaintiff might have brought his action to recover this money. The defendant having become bankrupt, the remedy is

(*a*) See *Philips* v. *Brown*, 6 *T. R.* 282 *Scott* v. *Ambrose*, 2 *M. & S.* 326.

1819.

Van Sandau *against* Corsbie.

changed by the 49 *G.* 3. *c.* 121. *s.* 8. That statute deprives the plaintiff of his remedy by action, and authorizes him to prove his demand in respect of any payment made on account of the debt under the commission, and it protects the defendant from all demands at the suit of the plaintiff with regard to his debt. Now I am of opinion, that when the remedy at law is taken away for the non-payment of the money, it is also taken away as to any consequential damage arising from such non-payment. I therefore think, that this action is not maintainable, and that the judgment should be affirmed.

Best J. I entirely concur in the opinion delivered by my Lord and my Brothers. I think that the certificate operates as a release of the debt, and of all demands arising out of that debt, and it would be absurd, that when the debt itself is released, the consequential damage resulting from it should remain a charge upon the bankrupt; if we were so to hold, we should deprive the bankrupt of one of the great advantages intended to be conferred on him by the legislature. Where money is to be repaid at a specified time, the lender of the money may frequently be damnified much beyond the extent of the principal and interest, and the borrower may, consequently, be liable for special damage. Now if the certificate did not operate as a bar against such a demand, there would have been frequent instances of actions of this nature. No instance, however, has been mentioned, in which such an action has been brought, and that, of itself, affords the strongest argument against the present claim. Upon the whole, I am of opinion, that this action is not main-

1819.

VAN SANDAU *against* CORSBIE.

maintainable, and that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

NETHERTON *against* WARD. (a)

Saturday, November 6th.

A tenement situate in the king's dock-yard, deriving a benefit from the public sewers, and occupied by an officer of government, who paid no rent, is liable to be rated to the sewers.

TRESPASS for taking plaintiff's goods: plea, not guilty. At the trial before *Graham* Baron, at the Spring assizes, 1818, for the county of *Surrey*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

The trespass complained of was the taking of the goods of the plaintiff by the defendant, as a distress for non-payment of a rate made by the commissioners of sewers, for the limits extending from *East Moulsey* in *Surrey* to *Ravensborne* in *Kent*, under whose authority the defendant acted. The plaintiff was assessed in the sum of 3*l.*, as upon a rental of 60*l.*, in respect of a messuage or tenement in his Majesty's dock-yard in *Deptford*, in the county of *Kent*, of which messuage or tenement the plaintiff then was, and still is the occupier, solely by virtue of the office of clerk of the survey of the said dock-yard, where he resided, and still resides, with his family and servants, not paying any rent for the same; nor can he occupy it longer than during the time of his holding such office, from which he may be removed at his Majesty's pleasure, at any time. The whole of the yard is within the district of *Church Marsh Sluice*, and the sluice and district are within the jurisdiction of the above commissioners. The dock-yard is principally drained by sewers, which are made and maintained at the expense of the crown; but the

(a) This case was argued at *Serjeants' Inn.*

1819.

NETHERTON *against* WARD.

dock-yard in general, as well as the house of the plaintiff, derive a benefit from the public sewers, which are under the direction and management of the commissioners. The whole of the dock-yard, and the messuage or tenement in respect of which the rate was made, as well as all the buildings and offices in such dock-yard, are the property of his Majesty. No rent, profit, or emolument, or advantage whatsoever, is derived to his Majesty from the dock-yard, or any of the buildings or offices therein, other than the use which is made of the same for the public office. The plaintiff was assessed by the rate in question, according to the yearly value of the messuage or tenement; and the commissioners are authorised by certain local acts, viz. 49 *G.* 3., 50 *G.* 3., and the 53 *G.* 3., to make a general and equal pound rate, upon all and every person or persons who did or should inhabit or occupy any house, building, tenement, or hereditament whatsoever, within the aforesaid district, according to the yearly value of each and every such house, building, tenement, or hereditament; and in pursuance of such authority they made the rate in question, if the plaintiff was by them assessable, in respect of the messuage or tenement. It was then stated, that proper steps had been taken, on the part of the commissioners, to authorise the distress on the defendant's goods; and also, that proper steps had been taken, on the part of the plaintiff, in order to the bringing of the present action. If the Court should be of opinion, that the plaintiff was not liable to be assessed to the rate, the verdict was to stand; if the Court should be of a contrary opinion, a nonsuit was to be entered.

Jervis,

1819.

NETHERTON *against* WARD.

Jervis, for the plaintiff. This property is not rateable to the sewers, being in the possession of the crown, producing no profit, and wholly dedicated to public purposes. The possessions of the crown are not rateable to the poor. Lord *Amherst* v. Lord *Somers* (*a*), *Eckersall* v. *Briggs* (*b*), *Holford* v. *Copeland.* (*c*) By the 23 *H.* 8. *c.* 5., the sewer rate is imposed on the landlord, and not on the occupier. It is a general rule, however, that the king is not to be barred of a right or privilege by general words in an act of parliament; he must be expressly named for that purpose. (*d*) The 9th section of the stat. 23 *H.* 8. *c.* 5. enacts, That the laws, ordinances, and decrees of the commissioners, shall bind the lands of his Majesty; but the stat. 3 & 4 *Edw.* 6. *c.* 8., which was passed in furtherance of the objects of the stat. *H.* 8., restrains the operation of that clause to lands of his Majesty in possession of his tenants, and thereby yielding a profit: it provides, that all money thereafter to be rated and taxed, by virtue of the commission of sewers upon the lands of His Majesty, shall be levied by distress; and that all bills of acquittance, signed by the collectors, shall be a sufficient discharge to the tenants, farmers, and occupiers of the same grounds so to be charged for the sum wherewith their grounds shall be charged, as also a sufficient warrant to the king's officers for the allowance to such tenants, farmers, or occupiers, for the same. The remedy by distress is not applicable to lands in the actual possession of the king; and this clause of the statute, which is explanatory of the 23 *H.* 8. *c.* 5., evidently contemplates such lands only of the king as are in the possession of his tenants yielding a profit. By

(*a*) 2 *T. R.* 372.
(*b*) 4 *T. R.* 6.
(*c*) 3 *Bos. & Pul.* 129.
(*d*) *Plowd.* 240.

1819.

NETHERTON against WARD.

the 49 G. 3. c. 183., which is a local act applicable to the district where these premises are situate, the commissioners are authorised to impose an equal pound rate upon all persons who inhabit or occupy any land, house, &c. within the district; and by sect. 35. the rate may be imposed either upon the tenant or occupier, or upon the landlord; and by sect. 36. the rates paid by the tenant are to be reimbursed by the landlord, by deduction from the rent or otherwise. This act, however, cannot apply to the present case, inasmuch as the king is not therein expressly named; and there being no rent payable, the tenant could not deduct the rate, nor could he compel the crown to reimburse it.

Platt, contrà. This property produces a profit to the crown, and is therefore rateable. It is true that the occupier does not pay any rent; but he gives his services in lieu of rent, and the privilege of inhabiting this house goes in deduction of his salary. By the stat. of 23 *H.* 8. *c.* 5. the lands of the king are expressly bound by the ordinances and decrees of the commissioners. The stat. of the 3 & 4 *Edw.* 6. does not restrain the operation of the former statute; it provides only for particular cases of lands of the king whose tenants pay rent, leaving all other cases as they stood before; and if the amount of the rate exceeded the rent, the lands would still be liable to be rated, and that rate might be levied by distress on the tenant; he cited *Whitley* v. *Fawsett*. (a)

ABBOTT C. J. I am of opinion, that the plaintiff, as the occupier of the messuage in question, was liable to this rate. It seems to me, that the question entirely

(a) *Styles*, 12.

depends

1819.

NETHERTON against WARD.

depends on the construction of the two statutes which have been referred to in argument, viz. that of the 23 *H.* 8., as connected with and explained by the 3 & 4 *Edw.* 6. Now, the statute of *H.* 8. was made to remedy a great public inconvenience, and to introduce a great public benefit. It enables his Majesty to issue a commission in a certain form therein mentioned, by which, among other powers given to the commissioners, was one "to enquire where defaults or annoyances be, through whose default the hurts and damages have happened, and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss, or disadvantage, by any manner or means, in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts, by the said walls, &c. and other the said impediments and annoyances, and all those persons, and every of them, to tax, discharge, distrain, and punish, as well within the metes, limits, and bounds of old time accustomed, or elsewhere within the realm of *England*, after the quantity of their lands, tenements, and rents, by the number of acres and purchase, after the rate of every person's portion, tenure, or profit." Now, it may be said, that if the act contained nothing more, the lands of his Majesty appropriated to the public service would not be liable to this rate; but by the 7th section it is enacted, "That the commissioners shall have power and authority to make laws, ordinances, and decrees;" then the 8th section provides, "That if any persons assessed to any lot or charge for any lands, &c. do not pay the said lot or charge, the commissioners may decree and ordain the said lands or tenements to any person or persons, for any term or terms of life or fee simple;"

1819.

NETHERTON *against* WARD.

simple;" and then comes the 9th section, by which it is provided, "That the same laws, ordinances, and decrees, to be made and ordained by the commissioners, shall bind as well the lands, tenements, and hereditaments of the king, our sovereign lord, as all other persons and their heirs, for such their interest as they shall fortune to have, or may have, in any lands, tenements, or hereditaments, or other casual profit, advantage, or commodity, whatsoever they be, whereunto the said laws, ordinances, and decrees shall anywise extend." There is, therefore, in the 9th section an express enactment that the lands, tenements, and hereditaments of the king shall be subject to the laws, ordinances, and decrees to be made and ordained by these commissioners. It might, however, have been doubtful, under this clause, whether the commissioners could distrain on the lands of the king to enforce the payment of this rate, and to remove any doubt on this subject; and in furtherance of the objects of the statute of *H.* 8., the stat. 3 & 4 *Edw.* 6. was made, by which it was enacted, "That all scots, lots, and sums of money, hereafter to be rated and taxed by virtue of such commission of sewers, upon any the lands, &c. of our sovereign lord the king, for any manner or thing concerning the articles of the said commission of sewers, shall be levied by distress." Now, that undoubtedly is a general legislative direction, that a distress for these rates might be taken upon the lands of the king. It has been argued, however, that these words are restrained by those which follow; for the statute goes on to say, that all bills of acquittance signed by the collector or receiver shall be a sufficient discharge to the tenants, farmers, and occupiers of the same grounds so to be charged for the said sum wherewith their grounds shall

1819.

NETHERTON *against* WARD.

be so charged, as also a sufficient warrant to all receivers and other officers of our lord the king, for the allowance to such tenant, farmer, or occupier, for the same. I cannot say, according to any reasonable construction of the act of parliament, that this second part of the section is to be considered as restraining the effect of the first, so as to confine the power of distress to such lands only as were in the possession of the king's tenants: it seems to me, that it is wholly unrestrained by the second, which applies only to a particular class of persons. For these reasons, it seems to me that the plaintiff was liable to the rate, and therefore that the judgment of nonsuit must stand.

BAYLEY J. I think it quite clear, that this property is within the words and spirit of the act of parliament; and it would be most unjust if it were not so. A great public expense is incurred, for the benefit of a whole district; and amongst the property in that district which is benefited is the dock-yard. In addition to this, the persons there residing are also benefited. Now the statute of *H.* 8. imposes a charge upon all persons who may be benefited by the expense which is so incurred, and expressly enacts, that the king's property shall not be exempted, which otherwise it would have been, because the crown is not bound by an act of parliament imposing a charge, unless expressly named. My Lord Chief Justice has commented on the provisions of the 3 & 4 *Edw.* 6., and I entirely concur in the explanation which he has given of that statute. It has been argued, that the property of the king is not to be liable, unless it be in the hands of a tenant yielding rent; but why should such a distinction be made, for the land of the king is equally benefited by the expense incurred, whether it be in the

hands

1819.

NETHERTON *against* WARD.

hands of a tenant, or whether it is applied by the crown to public purposes? If it is applied by the crown to public purposes, then it is for their benefit, and the public ought to pay. Why should the occupiers of land within the particular district bear the whole expense, the benefit of which is divided between them and the rest of the public? It is beneficial to the public at large that this land should be occupied as it is; and it is necessary for the purpose of occupation, that sewers, drains, &c. should be made, to defray the expense of which these rates are imposed. As the whole public have a benefit from this occupation, all parts of the kingdom ought to contribute. If this exemption, however, was to be allowed, the expense will be defrayed, not by the public at large, but by the occupiers of lands living within the particular district. It seems to me, therefore, that it would be an injustice to the inhabitants of this district if the lands of the crown applied to public purposes were exempt; and I therefore think, that to whatever purposes such lands are applied, they are equally liable to this expense, and therefore that the rate should be levied.

HOLROYD J. I am also of opinion, that the rate which has been made is a legal and valid rate. By the statute of *H.* 8. persons who hold any lands or premises, are bound by the decrees of the commissioners of sewers. By the statute 49 *G.* 3. *c.* 183. *s.* 33. the rate is directed to be made upon every person who may or shall occupy or inhabit any land, house, or building. By section 34. the occupier, or person in possession, is liable to be assessed for this rate; and by section 36. the occupier is entitled to be reimbursed by the landlord. Now, the plaintiff here is the occupier of a

 house,

house, and, as such, is assessable under this act of parliament, unless he be exempted by reason of its being land of the king. It seems to me, however, to be clear, that by the 9th section of the statute *H.* 8., explained as it is by the 3 & 4 *Edw.* 6. *c.* 8. *s.* 2., that the lands of the king are expressly made liable to this assessment; and I am therefore of opinion that this rate should be levied.

BEST J. I am decidedly of opinion, that the assessment, in the present case, was legal. The provisions of the stat. *H.* 8. are founded in justice. It is the object of that statute to tax all persons equally, and distribute fairly the public burdens. In this case, the dock-yard is drained by the money raised in the particular district; and yet it is contended, that the property embraced within the ambit of the dock-yard ought not to bear any of the burdens cast upon the district. That, however, would be most unjust; it would be taking a burden from the public and casting it upon particular individuals, in direct opposition to every principle of fair taxation. It has been found hard enough, in the case of poor-rates, that while other proprietors of lands are obliged to maintain the poor, the lands in the immediate occupation of the crown contribute nothing towards it, although the servants of the king who inhabit the palaces of the crown, situate on the lands of the crown, frequently bring burdens on the parish. It would be equally hard, in this case, that the property which derived advantage from the money raised in the particular district should not contribute to the burden. I can see no principle of justice on which it should be so exempted from its fair contribution. The statute of *H.* 8., however, has expressly

enacted,

1819.

NETHERTON *against* WARD.

enacted, that the lands of the crown shall pay this charge; and as to the statute of *Edw.* 6., I think the fair construction of it is this: That if the crown leases its lands, the more convenient mode of raising this tax shall be, not to apply in the first instance to the crown, but to charge the tenant, and allow the tenant to deduct it from the rent; for that clause would not at all apply to the case in which the crown had, for the public service, granted a lease at a nominal or pepper-corn rent. In that case, the person holding lands of the crown, without payment of rent, must stand in the situation of the crown, and must be taxed for the crown. It has been argued, that great inconvenience would follow from the enforcing of the payment of this tax. I do not think that the remedy by distress is applicable to the case of the crown, or that the stores of government are liable to be taken by that means; but although the king cannot be distrained upon, his tenants may, and that is sufficient to satisfy the statute of *Edw.* 6. The crown is not, by that statute, exempt from the payment of this rate, although it be difficult to say what remedy the commissioners might have, in such a case, against the king. It is, however, fitly supposed, from respect to the king and his justice, that there would be no necessity for applying for any such remedy. The moment it is stated that the king ought to pay a sum of money, it is presumed that he will pay it, and that it is not necessary to enforce that payment by distress. Upon the whole, I am of opinion that the plaintiff is liable to this tax, although paying no rent, as he stands in the place of the king, and ought to pay the rate; and therefore I am of opinion, that a nonsuit ought to be entered.

Judgment of nonsuit.

TOWNSON *against* TICKELL and Another. (*a*)

Saturday, November 6th.

A devisee in fee may by deed, without matter of record, disclaim the estate devised.

COVENANT by one of two devisees, of the reversion against the defendants, as lessees. The declaration stated that one *Jacob Astley*, being seised in fee of part, and possessed for long terms of years of other parts of the premises, by indenture, demised the same for certain terms therein mentioned, to the defendants; that *J. Astley*, by his will, devised the reversion of the demised premises unto the plaintiff and one *John Lock*, and that he appointed his daughter, *Harriet Anne Bush*, his executrix, and *Joseph Astley* and the plaintiff and *John Lock* executors of his will. It then stated the death of *Astley*, and averred, that *John Lock never would or did assent to the said will, nor to the appointment of him the said* John Lock *therein contained, to be one of the executors thereof*, nor to any bequest or devise therein contained, nor in any manner prove or join in the proof of, or act as or become an executor, or take upon himself the execution thereof; but always from the time of the death of the said *Jacob* wholly omitted and refused so to do, and on the contrary thereof, afterwards, to wit, on the 18th day of *May*, 1818, at, &c. by his certain deed, sealed with his seal, duly renounced the execution thereof; and afterwards, on the 19th *May*, in the year last aforesaid, by his certain other deed, the date whereof is the same day and year last aforesaid, absolutely disclaimed and renounced all and singular the estate and estates, trusts, powers, and authorities by the said will

(*a*) This case was argued at *Serjeants' Inn.*

devised.

1819.

TOWNSON *against* TICKELL.

devised, limited, created, or declared; and the said *Harriet Anne*, *Joseph*, and the plaintiff, afterwards, on the 25th of *June*, in the year last aforesaid, duly proved the said will, and took upon themselves the burthen of the execution thereof; and the plaintiff, afterwards, on the day and year last aforesaid, assented to the said devise and bequest of the said residue of the said reversion to him the said plaintiff in the said will contained, whereupon he became and was continually from thenceforth, until and at the several times thereinafter mentioned, remained and continued seised and possessed of the reversion of and in the said residue of the said demised premises; that is to say, seised of such reversion of and in divers parts of such residue in his demesne, as of fee, and possessed of such reversion of and in the other parts of such residue, for the residue of divers of the said long terms of years, then and still to come and unexpired. The declaration contained breaches of covenant, &c. General demurrer and joinder. The case was argued by

Manning, in support of the demurrer. The legal estate in these premises was, by virtue of this devise, in *Townson* and *Lock* jointly. Generally speaking, an estate of freehold cannot pass unless the change of possession be noted by livery of seisin, or matter of record; at common law there was no exception to this rule: by custom, indeed, or by virtue of the statute of *Wills* (32 *H.* 8. *c.* 1.) an estate may pass by devise, without livery of seisin. In that case the estate passes immediately on the death of the testator, to the devisee. In *Co. Litt.* 111. a., it is said, "that in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in the devisee

before

before he doth enter;" and if the freehold be in the devisee, it cannot be divested except by matter of record. And in *Sheppard's Touchstone*, 285., it is laid down, with respect to feoffments, gifts, grants, and leases, that they may be avoided by the disagreement of the party to whom they are made; and if it be a lease for years that is made, he may waive and avoid that by word of mouth, in the country, as well as a gift of goods, or an obligation delivered to his use; but if it be an estate of freehold, that is made by feoffment, it seems he cannot waive and avoid that but in a court of record. *Brok. Abr.* tit. *Joint-tenants, Plac.* 57., and *Butler* and *Baker's* case (*a*), are authorities to the same effect. It may, therefore, be laid down as a general proposition, that where a fee is devised to one, the estate remains in the devisee till he has disclaimed in a court of record. Where the estate is devised to two, and one enters, the estate remains in both till one disclaims in a court of record. The decision relied on in support of a contrary practice are all resolvible into cases falling within 21 *H.* 8. *c.* 4., or cases in which the freehold was not in question. In the first class, the principal case, upon the authority of which this modern innovation has been introduced, is that of *Bonifant* v. *Sir Richard Greenfield.* (*b*) There, a sale by three out of four executors, who were also devisees for sale, was adjudged to be good, "either by the common law, or by the statute of 21 *H.* 8.: for when he deviseth the land to four to sell, &c., and afterwards makes them his executors, this doth tantamount, as if at the first he had devised that such his executers should sell; and

(*a*) 3 *Co.* 26.

(*b*) *Cro. Eliz.* 80.

1819.

Townson *against* Tickell.

in such a case, at the common law, the sale by three, the fourth refusing, was good; *for they three may perform the will without the fourth*; but the statute maketh it clear." What, therefore, is here said with regard to the common law, applies only to executors being also devisees; and this case, thus explained, agrees with *Co. Litt.* 113. *a.* *Hawkins* v. *Kemp* (*a*) and *Denn* v. *Judge* (*b*), are authorities which merely recognize the case of *Bonifaut* v. *Greenfield.* At the head of the second class of cases stands Sir *W. Smith* v. *Wheeler* (*c*), and great stress is laid on the judgment of Lord *Hale* there. But all that is said with reference to the point, is this, "*Crooke* is a good lessor; for the other trustee's disagreement makes the estate wholly his." In the first place, it may be observed, that Lord *Hale* does not state in what manner the disagreement was to be evidenced. But what is more important, is, that there the estate to which the other trustee disagreed was merely a term for eighty years. *Doe* v. *Peach* (*d*), is an authority to shew, that the Court is not precluded from recurring to legal principle by any practice which may have crept in amongst conveyancers. [*Abbott* C. J. Must the disclaimer, in a court of record, be upon action brought?] It is not clear in what form the disclaimer was entered, but as there are ancient entries of claim under fines, there seems no objection to an entry of a disclaimer in like manner; but supposing that there could be no disclaimer, except after action brought, that state of things could impose no hardship on the devisee or grantee, as it is impossible to suppose a case in which he would sustain any

(*a*) 3 *East*, 410.
(*b*) 11 *East*, 288.
(*c*) 1 *Ventris*, 128.
(*d*) 2 *M. & S.* 576.

legal

legal injury in consequence of a damnosa hæreditas having been forced upon him, without his having the opportunity of questioning his liability to such damnification in a court of record.

1819.

TOWNSON *against* TICKELL.

Bayly, contrà. The whole legal estate had vested in the plaintiff, in consequence of one of the devisees having disclaimed by deed, for admitting that the estate passed by the devise to both, one has released his interest. In *Sheppard's Touchstone*, 318., it is laid down, that a release may be by the words "dedi concessi renunciavi," and it appears upon this record, that one of the devisees has released his interest by the term last mentioned, and then the whole legal interest vested in the plaintiff; but, secondly, *Lock* never had any legal estate in these premises, because no estate could pass to him, until he assented to the devise. Upon that point, *Thomson* v. *Leach* (a) is a decisive authority. The question there was, whether an estate passed to a surrenderee before he accepted the surrender. Three of the judges were of opinion that it did not pass until such acceptance. *Ventris* J. was of opinion, that it vested in the surrenderee immediately. The ground of his judgment was, that the assent o the party who takes is to be implied in all conveyances, because there is a strong intendment of law, that it is for a person's benefit to take, and no man can be supposed to be unwilling to do that which is for his own advantage. That learned judge clearly thought that no estate could pass to a party without his assent express or implied, and in page 206. he

(a) 2 *Ventris*, 198.

 says,

1819.

TOWNSON *against* TICKELL.

says, that a man cannot have an estate put into him in spite of his teeth; that case, therefore, is an authority to shew that an estate cannot pass to a surrenderee without his assent, and the principle is applicable to all other conveyances as well as to a devise. Now it appears upon this record, that one of the devisees never did assent to the bequest, and it follows, of course, that the legal interest never vested in him, but that it vested entirely in the plaintiff.

ABBOTT C. J. The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made. In this case the renunciation has been by deed under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority. It does not seem to me, however, that the cases have gone the length of deciding, that the renunciation must take place in a court of record. The learned counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record, and certainly it could not be done, unless some other person had thought fit to cite him, there to receive his dis-

1819.

TOWNSON against TICKELL.

disclaimer; and if the estate were damnosa hereditas, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to make a disclaimer in a court of record. The case of *Thomson* v. *Leach* seems to me to be a strong authority to shew, that that is not necessary. Three of the Judges there held, that an estate did not pass by surrender to the surrenderee till he expressly accepted it. Mr. Justice *Ventris* differed, and held that it passed immediately, liable to be divested by the dissent of the surrenderee. His judgment is, however, wholly founded on this, that a party to whom an estate is given, must be taken to give an implied assent to that which is for his benefit, till the contrary appears. That learned judge expressly states, that a man "cannot have an estate put into him in spite of his teeth." I concur in that opinion, and think that the renunciation here having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void, and, consequently, that there must be judgment for the plaintiff.

BAYLEY J. I am of the same opinion. There are many instances in which a devise to a party might subject him to great inconvenience, as for instance, a devise of an estate clothed with trusts. And as in such a case, a party cannot be forced to be a trustee, it would be absurd that the estate should be in him and remain in him, until he can prevail upon some person to institute certain legal proceedings under which he is to disclaim in a court of justice? The good sense of the thing is quite the other way; the law indeed presumes, that the estate devised will be beneficial to the devisee, and that he will accept of

 it,

1819.

Townson *against* Tickell.

it, until there is proof to the contrary. Here is a renunciation by a most solemn act, viz. by deed; and by that he has said, that he did not choose to accept that which is devised to him. It seems to me, that the effect of that is, that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient, and that there ought to be judgment for the plaintiff.

Holroyd J. I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to shew his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shews that he never did assent to the devise, and, consequently, that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to shew, that he did not assent to the devise. Unless some strong authority were shewn to that effect, I cannot think that the law requires either of these forms. I am confirmed in that opinion by the case of *Bonifaut* v. *Greenfield.* (a) There the devise was to four executors: one of the executors refused to take out administration of the will, and it was objected, that the sale was not good; to which it was answered,

(a) 1 *Leon.* 60. *Cro. Eliz.* 80.

that

1819.

TOWNSON *against* TICKELL.

that as it was devised unto him for the intent to sell, if he refused to sell he refused to take the estate, and so that it was unnecessary that he should join in the sale; the Court, however, held the sale good, although the devisee had not renounced the estate either by matter of record or by deed. It seems to me, therefore, both upon the reason of the thing and the authority of this case, that the disclaimer need not be either by matter of record or by deed. In this case, however, the party has disclaimed by deed, which, in my opinion, is sufficient. The whole legal estate, therefore, is vested in the plaintiff; and, consequently, he is entitled to the judgment of the Court.

BEST J. I am entirely of the same opinion. Although an estate is generally beneficial to the devisee, yet estates are often devised to persons as trustees for others. Now, if the only mode by which such trusts could have been renounced, was by disclaimer in a court of record, innumerable instances must have occurred: none, however, have been cited; and that affords the strongest argument against the necessity of having recourse to such a mode of proceeding. It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it: there must be the assent of the party, before any interest in the property can pass to him. It is stated in the declaration, that this party has, by his solemn deed, expressed his dissent, and renounced the estate devised by the will. It appears to me, therefore, that no interest ever vested in him; and, therefore, there is nothing more to be done for the purpose of giving the sole property to the plaintiff.

1819.

TOWNSON *against* TICKELL.

Manning then urged, that the plaintiff had not conveyed to himself a good title to the lands, in which the testator had only a leasehold interest. The plaintiff now claims as personal representative of the testator; and the declaration states, that he, being one of several executors, assented to the bequest to himself. In *Com. Dig.* tit. *Administration*, C 8., it is said, "If the devise be to one executor he may take, by his own assent, without the other." For which, the reference is to 1 *Rol.* 618. *l.* 47.; but *Rolle* himself refers to 11 *H.* 4. 84. (*Brovingre's* case, *T.* 11 *H.* 4. fo. 83, 84. pl. 31.) in which the only point decided was, that a legatee, who is named one of the executors, by taking the property bequeathed to him is estopped from saying that he never administered. He also referred to *T.* 5 *H.* 7. fo. 5. pl. 5.

Per Curiam. One co-executor may release a debt, and do other acts, without his companion, and he may therefore assent to a bequest to himself.

Judgment for plaintiff.

Saturday, November 6th.

The APOTHECARIES' Company *against* WARBURTON. (*a*)

Where a defendant was sued for a penalty under 55 *G.* 3. *c.* 194. *s.* 20., and contended that he was within the exception, as having, prior to *August* 1. 1815, actually practised as an apothecary: Held, that it was proper, in summing up to the jury, for the Judge to refer to the 5th section of the act, as describing the duty of an apothecary to be to make up the prescriptions of physicians; and it appearing that the defendant never had, or could have done so, prior to *August* 1. 1815, that such total incapacity was cogent evidence to be left to the jury, and that they did right to find that he had never practised *as an apothecary*, although, in fact, he had on many occasions administered medicines to various patients prior to that period.

DEBT for penalties, under 55 *G.* 3. *c.* 194. *s.* 20. The declaration stated, that defendant, not then being a person who, on the 1st *August*, 1815, or at any

(*a*) This case was argued at *Serjeants' Inn.*

time

1819.

APOTHECARIES' Company *against* WARBURTON.

time theretofore, was actually practising as an apothecary, did, on, &c., act and practise as an apothecary in *England*, to wit, at, &c., by then and there, as such apothecary, attending and advising, and furnishing and supplying medicines to one *Owen Benyon*, without having obtained such certificate as by the said act is directed, whereby, &c. The cause was tried at the last *Stafford* Spring assizes, before *Garrow* B., when it was admitted that the defendant had so acted, with respect to *Benyon*, as to subject himself to the penalty of 20*l.* imposed by the act. But it was contended, that he came within the 20th section, as having actually practised as an apothecary before 1st *August*, 1815. The evidence on this subject was, that long previous to that period the defendant had attended many persons (several of whom were called), in different complaints, and had administered medicines to them; but it appeared that he was unable, previously to the 1st *August*, 1815, to make up a physician's prescription, the evidence being, that in 1817 having then received some instructions in Latin, he was just able to do so. There was also contradictory evidence, as to the defendant's having practised independently of his father, previously to *August* 1st, 1815. The defendant's father, by whom, as it was said, he had been educated, being called as a witness, displayed extreme ignorance, being wholly unable even to spell *English* words, or to read a physician's prescription. He had practised principally as a farrier; but had also attended human patients, and stated in cross-examination, that he was ignorant of the relative proportions of weights or measures, having been in the habit of ascertaining quantities "by hand." The learned Judge, after observing on the contradictory evidence, referred the

jury

1819.

APOTHECARIES' Company *against* WARBURTON.

jury to the 5th section of the act, in which it was stated to be the duty of an apothecary to prepare such medicines as may be directed for the sick by a physician lawfully licensed; and told them, that as it appeared that up to the 1st *August*, 1815, the defendant never had or could have so done, they ought to take that clause of the act into their consideration, in determining whether he was within the exception in the 20th section, which required that he should be actually and bonâ fide practising as an apothecary previous to that period. The jury found a verdict for the plaintiffs. *Puller*, in last *Easter* term, obtained a rule nisi for a new trial, on the ground that the learned Judge had misdirected the jury, in referring them to the 5th section of the 55 *G. 3. c.* 194.

Campbell and *Gow* shewed cause. They contended, that the question was properly left to the jury. In order to practise as an apothecary, a party must be capable of executing the whole of an apothecary's duty, although perhaps not with exactness and skill; but here there is a total incapacity, as to one part of his duty, which is considered by the legislature as the most important. There is, therefore, no ground for disturbing this verdict.

Jervis, *Puller*, and *Twiss*, contrà. The learned Judge misdirected the jury, in referring them to the 5th section of the act; for the exception has no reference to the quantum of knowledge possessed by a defendant, but only to the fact of his having practised; and if the direction was correct, it would follow, that every person who did not possess complete skill as an apothecary would be subject to the penalty. The

legislature

1819.

APOTHECARIES' Company *against* WARBURTON.

legislature itself, in the 7th section, recognises that there were ignorant persons then in practice; but thinking, no doubt, that that was an evil which time would cure, they did not take away their existing rights, but only provided, that in future no such persons should be permitted to practise. The only question, therefore, which ought to have been left to the jury was, whether in fact this defendant had administered medicine as an apothecary previously to *August* 1st, 1815, and no reference should have been made to the 5th section. Besides, the apothecary there mentioned is one who has obtained his certificate; that section, therefore, was wholly inapplicable. They also referred to *Wogan* v. *Somerville.* (*a*)

ABBOTT C. J. I am of opinion, that in this case the direction of the learned Judge was correct, and that the conclusion to which the jury have come was also correct. The point to be decided was, whether, previously to the 1st *August*, 1815, the defendant had actually practised as an apothecary. Now, to decide that question, we must previously determine what is the meaning of the words, "practise as an apothecary." In order to ascertain that, it was perfectly natural and proper to look into other parts of the act itself, in order to ascertain the sense in which the legislature had used those words. Now, that is what was done by the learned Judge upon the present occasion; for he called the attention of the jury to the 5th section, where it is manifest that the legislature have considered it as a part, and a most important part, of the duty of an apothecary,

(*a*) 7 *Taunt.* 401. 1 *Moore*, 102.

to

1819.

APOTHECARIES' Company *against* WARBURTON.

to make up the prescriptions of physicians. That being so, can it be said that this defendant practised as an apothecary on or before *August* 1st, 1815, when he never did nor professed to do, nor, as it appears, could have done this important part of his duty, previously to that period. I think, therefore, that the jury formed a right conclusion from the evidence. It does not appear, that in this case, the Judge left any question to the jury, as to the degree of skill which the defendant possessed; but he left it to them to determine, whether his ignorance, which was proved, was not cogent evidence, from which they ought to conclude that he had never actually and bonâ fide practised as an apothecary at all. Now, as it appeared that he could not have read the language in which prescriptions are usually written, and even if the prescription had been in *English*, that he was not acquainted with the characters used to denote the different weights, &c., I think that this was cogent evidence for their consideration, and that the direction of the learned Judge was right.

BAYLEY J. The object of the legislature, in this act of parliament, was to prevent persons from commencing the business of an apothecary, without having obtained a certificate from the court of examiners of the Apothecaries' Company; but they did not mean to interfere with those persons who had been, prior to the 1st of *August*, 1815, in the habit of practising as apothecaries, whatever might be the degree of skill which those persons possessed. The mere act, however, of administering medicines will not be enough of itself to justify the conclusion, that a person so acting practises as an

1819.

APOTHECARIES' Company *against* WARBURTON.

apothecary. In order to ascertain what these words mean, we cannot do better than look at the different clauses of the act; and I think, therefore, that the learned Judge was quite right in drawing the attention of the jury to the 5th section. It certainly was not a question for the jury to determine, whether the defendant possessed competent skill; for the only question was, whether he had practised as an apothecary. Now, it appears that the defendant had followed his father's steps, and his father had been principally a farrier. It is true, that he also administered medicine to the human species; but the mere occasional administering of such medicines, where it is not the principal and main business, will not be enough. Now, in the 5th section, the legislature have described part of the duty of an apothecary, and the defendant has not proved, as he easily might have done if the fact had been so, that he ever did or could perform that part of his duty: indeed, the contrary is proved. Now, the fact of his utter incapacity to do this, afforded strong evidence to shew that the defendant never did, prior to the 1st *August*, 1815, actually and bonâ fide practise as an apothecary. I can see, therefore, no objection either to the direction of the learned Judge, or to the verdict of the jury.

HOLROYD J. In this case it was admitted as a fact at the trial, that the defendant had practised so as to be liable to the penalty contained in the 20th section, unless he was protected by the exception, as being a person who had practised as an apothecary, prior to *August* 1st, 1815. Now the onus probandi lay upon him to shew that; and it appears that the Judge, in directing

1819.

APOTHECARIES' Company against WARBURTON.

directing the jury, referred them to the fifth section of the act. I think that he was right in so doing, for when the jury had to consider what it was to practise as an apothecary, it was surely right for them to know what were the duties of an apothecary. Now it was proved, that in 1817 this person was just able to make up a physician's prescription, and the jury might therefore properly infer, that prior to that period he was utterly incapable, and had never even professed to do it; and if so, they might lawfully conclude, that he had never actually practised as an apotheracy. The cases of defective skill and partial incapacity are very different, and may, perhaps, be within the protection of the act; but here there is a total incapacity: and I think, therefore, that there are no grounds for setting aside this verdict.

Best J. I fully concur in the opinions which have already been delivered by the Court, and I think this a case of great importance; for it is the duty of the Court to protect, as far as they can, persons in the lower classes of life from the ignorance of these pretenders to medicine. The only question is, whether there has been any misdirection on the part of the learned Judge. I think there was not. He only referred the jury to the 5th section, in which the legislature have described what the duty of an apothecary is, in order to assist them in forming their conclusion, whether this defendant had practised as an apothecary or not. Now I am of opinion, that if he had not, prior to the time mentioned in the act, practised to the full extent of that description, he cannot be considered as having practised as an apothecary. Formerly, I be-

6 lieve,

1819.

APOTHECARIES' Company *against* WARBURTON.

lieve, the only duty of an apothecary was, to make up the prescriptions of physicians. In more modern times, however, they have been in the habit of attending patients, and administering medicines upon their own judgment. But still it has always continued to be a most important branch of their duty, to make up the prescriptions of others. Of this part of his duty the defendant, it appears, was, prior to the 1st *August*, 1815, wholly incapable. And it seems to me, that we might as well say, that a person who had served notices in a few cases had practised as an attorney, as that this defendant had, under the circumstances here stated, practised as an apothecary. I therefore see no grounds for disturbing the present verdict.

Rule discharged.

BURRELL *against* JONES and Another. (*a*)

Saturday, November 6th.

The solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained: Held, they were personally liable.

THIS cause was referred, by order of nisi prius, to an arbitrator, who ordered the verdict to be entered for the plaintiff for 301*l*. 16*s*. 9*d*.; but to enable the parties to take the opinion of the Court whether the action could be maintained against the defendants personally, he stated the following facts for the opinion of the Court, and he awarded, that if the Court should be of opinion that the action was maintainable, the award should stand; but if the Court should be of opinion that the action was not maintainable, a nonsuit or verdict should be entered for the defendant, as the Court should direct.

(*a*) This case was argued at *Serjeants' In*

The

1819.

BURRELL *against* JONES.

The plaintiff having let an estate called *Glynllygwy*, to one *John Lloyd Jones*, and there being a considerable arrear of rent due, on or about the 19th *February*, 1817, he caused a distress to be made for such rent, and whilst his bailiff was in possession, the defendants, who were the solicitors of the assignees of the tenant, against whom a commission of bankrupt had issued, applied to the plaintiff's agent, Mr. *John Houston*, to deliver up the distress, and transmitted to him the following undertaking, signed by them the defendants.

"We, as solicitors of *Thomas Mostyn Edwards*, *John Heaton*, and *John Powell Foulkes*, esquires, assignees of the estate and effects of *John Lloyd Jones*, against whom a commission of bankrupt has been awarded, do hereby undertake to pay the Hon. *P. R. D. Burrell*, such rent as shall appear due to him from the said *J. L. Jones*, for the occupation of *Glynllygwy* farm, within six weeks from the date hereof, provided such rent does not exceed the value of the effects distrained." Upon the delivery of the undertaking to *Houston*, he signed the following indorsement upon it. "To the within named *T. Mostyn Edwards*, *John Heaton*, and *John Powell Foulkes*, esquires, &c. On behalf of the Hon. *P. R. D. Burrell*; I do hereby consent and agree to abandon the distress made on the goods, cattle, and chattels now being on *Glynllygwy* farm, and to withdraw from thence the bailiff whom I have placed in possession thereof, in consideration of the within undertaking, for payment of the rent thereof, on a condition which I accept of and agree to. 24th *February*, 1817." The bailiff was accordingly withdrawn, and the goods, valued at 301*l.* 16*s.* 9*d.*, were afterwards sold by the assignees. At the trial, and also on the reference, it

was

1819.

BURRELL against JONES.

was contended, that the action should have been brought against the assignees and not against the defendants. If the Court should be of opinion that the defendants had made themselves personally liable, the award was was to stand for the sum of 301*l.* 16*s.* 9*d.*

Reader, for the plaintiff, was stopped by the Court.

Denman, contrà. The defendants contracted merely on the part of the assignees; they expressly state, that they contracted as solicitors, which is expressive of the term agent. Now, where the party contracting is known to be a mere agent, he is not personally responsible, and he cited *Macbeath* v. *Haldimand* (*a*), *Bowen* v. *Morris.* (*b*) Besides, here the plaintiff's agent himself has treated this as a contract with the assignees, and not with the defendants.

ABBOTT C. J. I am of opinion, that the expression used in this undertaking, "we, as solicitors," binds those who personally signed it. Many persons will deal with solicitors and professional men (from the confidence they have in their known character and situation in life), who will not deal with an unknown client. It would be preventing much of the ordinary business of life, if we were to hold, that a solicitor entering into such a contract as this did not make himself personally responsible. It is for him to consider the probable effect of such an instrument before he signs it. In this instance, the defendants, for their own security, ought when the goods were sold to have had the proceeds placed in their own hands, in order to pay the plaintiff. The case of *Mac-*

(*a*) 1 *T. R.* 172. (*b*) 2 *Taunt.* 374.

1819.

BURRELL against JONES.

beath v. *Haldimand* stands on a very different principle. There the contract was with a known agent of government, for stores furnished for the public use, and there was no personal undertaking on his part; and that case has been followed by others to the same effect. In *Appleton* v. *Binks* (a) it was held, that one who covenanted for himself, his heirs, executors, &c., for the act of another, was personally bound by his covenant, although he described himself in the deed as covenanting for and on the part and behalf of such other person. That case is very like the present, and, upon the whole, I am of opinion, that by the language of this instrument, the defendants made themselves personally responsible, and that the verdict ought therefore to stand.

BAYLEY J. I am of the same opinion. It is clear, that an agent may so contract as to make himself personally liable, and I think that the words here used, " we undertake," are sufficient to place the defendants in that situation. The language of an instrument is to be taken most strongly against the party using it. Now when the defendants used the words, " we undertake to pay," they in effect say, that they are the persons to whom the other party is to look for payment.

HOLROYD J. I am of the same opinion. The defendants, in this instrument, have used the words, " we undertake to pay." Those words, therefore, are to be taken most strongly against themselves; and that being so, I am of opinion that the defendants are personally liable.

(a) 5 *East*. 148.

If

1819.

BURRELL against JONES.

If they are not, nobody is bound by this undertaking; for it is perfectly clear, that the assignees are not bound. The import of the instrument is, not that the assignees undertake, through the medium of the defendants, as their solicitors, but that they the defendants themselves, as solicitors, undertake. Now, strictly speaking, they cannot undertake merely in their character of solicitors; they have no power, as solicitors, to pledge the credit of their clients; consequently, they could not, as solicitors, bind the assignees. It is very intelligible, however, that being solicitors to the assignees under the commission, the defendants should personally undertake to pay the rent out of the value of the goods, provided that rent did not exceed the value of the effects distrained, and I think that must be taken to be the effect of the undertaking, and, therefore, that the verdict ought to stand.

BEST J. I am of the same opinion. I think, that by this instrument, the defendants are personally bound. The term, "as solicitors," is merely descriptive of the character they fill, and which has induced them to undertake. In the case of *Appleton* v. *Binks*, the defendant undertook for and on behalf of another, yet he was held to be personally bound by the covenant; that case was by deed, and therefore was much stronger than the present.

Judgment for the plaintiff.

1819.

Saturday, November 6th.

CARPENTER and Another, Executors, *against* THORNTON. (*a*)

An action at law is not maintainable upon a decree of a court of equity, for a specific sum of money founded on equitable considerations only; and therefore, where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase-money and costs: Held, that no action at law was maintainable to recover such interest and costs.

THE declaration stated, that *J. Norris* exhibited his bill against the defendant in Chancery, for the specific performance of an agreement entered into by the defendant with *J. Norris*, for the purchase of an estate; and such proceedings were had, that afterwards, in the life-time of *Norris*, by a certain decree made in the said cause by the Vice-Chancellor, it was declared, that the said agreement ought to be specifically performed; and it was ordered, amongst other things, that it should be referred to Mr. *Campbell*, one of the Masters of the Court, to compute interest after the rate of 5 per cent. per annum, on the sum of 5500*l*., the residue of the purchase-money, from the 3d day of *May*, 1812, and to tax the said *J. Norris* his costs of that suit. The declaration then stated the death of *Norris*, and that the plaintiffs, as his executors, proved the will, and exhibited their bill of reviver against the defendant in Chancery; and that by a decree of the Vice-Chancellor the suit was revived; and that such proceedings were thereupon had, that on the 14th *January*, 1815, by an order of the Vice-Chancellor, after reciting the aforesaid decree, and that there was then standing, in the name of the accountant-general, in trust in the said cause, bank 3 per cent. annuities to the amount of 8133*l*. 1*s*. 10*d*.; and that there was then re-

(*a*) This case was argued at *Serjeants' Inn*.

maining

1819.

CARPENTER *against* THORNTON.

maining in the bank, in cash, 219*l.* 11*s.* 10*d.*, which the plaintiffs were desirous of having transferred, and paid to them in part discharge of the principal, interest, and costs due to them in the cause; and that it was prayed that the accountant-general might be directed to transfer the same into the names of the plaintiffs, in part discharge of the principal, interest, and costs, directed to be paid to *J. Norris*, in the original cause, by the aforesaid decree, the plaintiffs thereby offering, on such transfer being made, to deliver up to the defendant the conveyance of the estate, with the title-deeds; *it was ordered* that the said sums of money should be transferred to the plaintiffs, according to their prayer, and upon the terms therein mentioned. The declaration then stated, that on the 3d of *August*, 1815, the Master, by his report, computed the interest on 5500*l.* from 3d *May*, 1812, to 4th *January*, 1815, to be a certain sum therein mentioned; and that he had taxed the costs in the suit at a certain other sum, as by the said report, amongst other things, would appear; which said report was afterwards confirmed by the Vice-Chancellor, of all which premises the defendant had notice. It then averred, that the decree was still in force, and that the plaintiffs had not obtained any execution or satisfaction thereon, but that the money thereby ordered to be paid was still wholly due and unpaid, whereby an action hath accrued to the plaintiffs, as executors, to demand the sum awarded for interest and costs. To this declaration there was a general demurrer. The case was now argued by

Barnewall, in support of the demurrer. There is no instance of an action having been brought upon a

1819.

CARPENTER *against* THORNTON.

decree of a court of equity, having the power to enforce its decrees in this country. In *Sadler* v. *Robins* (*a*), Lord *Ellenborough* intimated, that a court of law would give effect to a decree of a court of equity; but that was the decree of a colonial court, which had no power to enforce its decrees in this country; and it appeared, besides, to have been a bill for an account which might be the subject of a claim in a court of law. The Court then called upon

Selwyn, contrà. This is certainly a novel action; and if the argument of novelty were to prevail, it would be decisive. That ground of argument, however, was taken on former occasions, and considered as of little weight, especially by *Pratt* C. J., in *Chapman* v. *Pickersgill.* (*b*) The principle on which the action of debt is founded is sufficient to maintain the present action. It is clear, from the authorities, that debt would lie, although there be only an implied contract. As if a man be found in arrear upon account. 1 *Rol.* 598. *l.* 47. So, though the account be made before auditors. *Com. Dig.* tit. *Debt* A 9. So, debt lies upon an award. Upon the same principle, debt will lie in this case. A court of competent jurisdiction having, by its judgment, ascertained a sum of money to be due from the defendant to the plaintiffs, that raises an obligation on the part of the defendant to pay, and thence the law implies a contract. Here the adjudication of the Court of Equity was final, for the Master's report had been confirmed by the Vice-Chancellor; and,

(*a*) 1 *Campb.* 253. (*b*) 2 *Wils.* 146.

on

1819.

CARPENTER *against* THORNTON.

on that ground, this case is distinguishable from *Emerson* v. *Lashley* (*a*), and *Fry* v. *Malcolm* (*b*), where it was holden that actions could not be maintained on a mere interlocutory order. A decree of a court of equity stands in the same degree as a judgment at law, in the administration of assets. *Morice* v. *Bank of England.* (*c*) In *Sadler* v. *Robins*, Lord *Ellenborough* seems to have been of opinion that such an action was maintainable, provided the action were brought upon a final adjudication.

ABBOTT C. J. It has been suggested that there is, in this case, an implied contract, on the part of the defendant, to pay this money to the plaintiff, and therefore that a court of law ought to entertain this suit; but, under the special circumstances of this case, I am at a loss to find any thing like an implied contract. If this were merely a bill filed for an account, and, upon the balance, a precise sum of money was found to be due, which might originally have formed the subject of an action at law, a court of law might, perhaps, in that case, lend its aid to enforce such a decree. Here, however, it appears by the declaration, that the testator filed his bill against the defendant, for the specific performance of an agreement for the purchase of an estate; and that the Vice-Chancellor decreed that the agreement should be specifically performed, and ordered that it should be referred to a Master in Chancery to compute interest on the sum of 5500*l.*, the residue of the purchase-money, and to tax the plaintiff's costs. I suppose this was founded on the supposition, that the

(*a*) 2 *H. Bl.* 248. (*b*) 4 *Taunt.* 705.
(*c*) 4 *Bro. P. C.* 287. folio edition.

1819.

CARPENTER *against* THORNTON.

purchaser was in possession. The declaration, after stating the death of the testator, stated that the plaintiffs, as his executors, revived the suit, and that the Vice-Chancellor, on their petition, had ordered a sum standing in the name of the accountant-general to be transferred to the plaintiffs, in payment of the purchase-money; and then stated the report of the Master, by which a sum was found to be due to the plaintiffs for interest on the residue of the purchase-money, and a further sum for costs, and that the Vice-Chancellor confirmed the report. It appears to me, that the whole of this demand for the balance of interest and costs, arises out of this decree of the Court of Equity: and that it had no foundation prior to that decree. Now, I cannot say that a man, compelled by a court of equity against his will to pay a sum of money, impliedly agrees to pay the money. There certainly is not any express contract. It seems sufficient for me to say, in this case, without laying down any general rule on the subject, that the only ground upon which this case has been put in argument, viz. that of an implied contract, wholly fails; and that being so, there must be judgment for the defendant.

BAYLEY J. The foundation of the suit in equity, in this case, seems to have been an equitable obligation, on the part of the defendant, to pay the money. This suit, if it can be maintained at all, must be founded upon a legal obligation to pay. The decree in equity merely ascertains that the defendant is under an equitable obligation to pay: it does not go further, and shew that there is any legal obligation. The case of *Emerson* v. *Lashly* seems to be analogous to this case. There an

action

1819.

CARPENTER *against* THORNTON.

action was brought to recover a sum directed to be paid by an interlocutory order of an inferior court. Although that order produced a moral obligation to pay, the Court of Common Pleas decided that it did not form any ground for an action at law. It seems to me, that in this case the decree, founded only upon an equitable obligation, does not furnish any foundation for an action at law.

HOLROYD J. I am of opinion that this action is not maintainable. The decree does not affect to decide what was actually due, in point of law, on the balance of an account, but it merely directs what is to be paid on an equitable consideration. It is said, however, that the law will, in such a case, imply a promise to pay. In the case of judgments of inferior courts, and courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law requires. When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the Court. Now, although that does not absolutely shew that such an action is not maintainable; yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable. In references at nisi prius, which are afterwards made rules of Court, a verdict is usually taken to secure the payment

1819.

CARPENTER *against* THORNTON.

ment of the money which may be awarded: unless that be done, the award is invariably enforced by attachment. In *Tremenhere* v. *Tresillian* (*a*), it is said that upon such a rule an action might be maintained. In such cases, however, the rule is made with the consent of the parties: and when they consent to the rule, they consent to the submission, and the breach of that submission is the foundation of an action. Although the parties, by entering into the rule, may have subjected themselves to the further obligation of obeying the order of Court, the neglect of which may be punished by attachment, yet the breach of the submission is the ground of the action. Admitting, however, that an action might be maintained on a rule of Court made with the consent of the parties, it by no means follows that an action will lie upon a rule of Court obtained in invitum. Such an order does not constitute a legal debt, which alone the law will imply a promise to pay. This decree of the Court of Equity does not, therefore, constitute such a debt. It must, therefore, be enforced by the Court which made it, and is not the subject of an action at law.

BEST J. The object of this action is to enforce a mere equitable demand, founded upon an order of Court. Now, in *Fry* v. *Malcolm*, the Court of Common Pleas were of opinion, that an action was not maintainable upon an order of Court for the payment of money. It seems to me, that the principle of that case applies to the present, and consequently that there must be judgment for the defendant.

Judgment for the defendant.

(*a*) 1 *Sid.* 452.

1819.

CUMING *against* HILL. (a)

Saturday, November 6th.

Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and that he then avoided the indenture: Held, that this was no answer to the action.

ACTION of covenant on an indenture of apprenticeship, in the common form, by the master against the father of the apprentice. The breach assigned was, that the apprentice had absented himself from the service. Plea, that the apprentice, at the time of making the indenture, was an infant, of the age of seventeen years; and that on the 20th *October*, 1818, he attained his full age of twenty-one years, until which time he faithfully served the plaintiff, according to the meaning of the indenture; and after he had attained the age of twenty-one years, he, on the 21st *October*, 1818, made void the indenture and quitted the service of the plaintiff, as it was lawful to do under the statute 5 *Eliz.* To this plea there was a general demurrer.

Abraham, in support of the demurrer, cited *Branch* v. *Ewington* (b), and

Bayly, contrà, being then called upon by the Court, admitted that he could not support the plea.

ABBOTT C. J. I am of opinion that the father is liable to this action. He covenants that the son shall faithfully serve; the avoidance of the apprenticeship by the son during the term, cannot discharge the father's covenant. The indenture of apprenticeship has existed

(a) This case was argued at *Serjeants' Inn.*

(b) 2 *Doug.* 518.

in

1819.

CUMING *against* HILL.

in this form for more than a century, and has been in universal use. A construction has been put upon the instrument in a court of law, in the case cited from *Douglas*. I do not see any reason to doubt the propriety of that decision, and I think, therefore, upon principle as well as upon authority, that the defendant is answerable in this action.

BAYLEY J. I may bind myself that *A. B.* shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer in an action brought against the father, for the breach of that covenant, for him to say, that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, and the father is liable.

HOLROYD and BEST Js. concurred.

Judgment for the plaintiff.

Saturday, November 6th.

GREEN *against* DAVIES and Another. (*a*)

A justification in trespass stated, that by custom, a court had, from time immemorial, been holden before the steward *and* port-reeve of a borough, or their sufficient deputy or deputies, and that a court was holden before *C. D.*, the deputy of *A. B.*, who was then steward and port-reeve: Held, that upon this plea the two offices must be taken to have been compatible, and that the appointment of the deputy by the person holding both offices was sufficient.

TRESPASS for breaking and entering plaintiff's dwelling-house, situate in the parish of *Swansea*, in the county of *Glamorgan*, and taking plaintiff's goods

(*a*) This case was argued at *Serjeants' Inn*.

and

1819.

GREEN *against* DAVIES.

and chattels. Plea first, not guilty; secondly, that the borough of *Swansea* is an ancient borough, and that in the said borough there is and from time immemorial hath been a Court of Record, called the Court of Pleas, for the trial and determination of all personal actions and pleas personal, arising within the borough and jurisdiction of the same court, there held and to be held in the borough on *Monday* in every three weeks, and that the said court is and from time immemorial hath been held before the steward *and* port-reeve of the said borough, or their sufficient deputy or deputies. It then stated, that at a court of record holden at *Swansea*, of the said Court of Pleas, within the jurisdiction of the court, according to the custom of the court, time out of mind used and approved of in the said borough, on or before *W. Grove*, esquire, then being the deputy of *Robert Nelson Thomas*, who then and before, and at the time of the judgment, until and upon the execution of the writ, in the action thereinafter mentioned, was the *steward and port-reeve* of the borough aforesaid. The plea then justified the trespass on a fi. fa. out of that court. To this plea there was a special demurrer.

Littledale, in support of the demurrer. This court had no jurisdiction, and consequently trespass will lie. It appears from the plea, that the court is to be held before the steward and port-reeve, or their sufficient deputy or deputies. Two persons, therefore, who fill certain offices, must compose the court; they may, however, concur in appointing one deputy, or each may appoint a separate deputy; where the principals hold the court, it must be held before two persons; no usage or custom is alleged that the court can be held before

1819.

Green *against* Davies.

before one person holding both offices; and unless such usage can be shewn, it cannot be done, for it may be laid down as a general rule, that if a court, by custom, is to be held before two officers, one alone cannot hold it. The court of chivalry, which was held before the constable and marshal, could not be held before one of those officers alone. In *Co. Lit.* 74. b. it is said to have been resolved, in Sir *Francis Drake*'s case, "who strook off the head of *Dowtie*, in partibus transmarinis, that his brother and heire might have an appeale. Sed regina noluit constituere constabularium Angliæ, &c. et ideo dormivit appellum." It appears from this, that because the queen would not appoint the constable, the court could not be held; and *Parker*'s case (*a*) and the judgment of *Holt* C. J. in *Chambers* v. *Jennings* (*b*), and *Oldis*'s case (*c*), are authorities to the same effect: the offices, therefore, are incompatible. The court may, however, be held before their sufficient deputy or deputies. Now as the appointment of a deputy is a power to be executed, it must be executed strictly. *Viner's Abr.* tit. *Authority*, 417, 418. Now it appears, that the deputy must be appointed by the steward *and* portreeve: the authority is given to the two jointly; and the public have a right, therefore, to have the concurrent judgment of two officers in appointing one deputy. Here it appears, that the court was held before a deputy appointed by one person only; the custom, therefore, was not strictly pursued, and the court was not well constituted.

(*a*) 1 *Lev.* 230. 1 *Sid.* 352. *Show. Parl. Cases*, 66.

(*b*) 7 *Mod.* 125.

W. E. Taunton,

1819.

GREEN *against* DAVIES.

W. E. Taunton, contrà. It is admitted, upon these pleadings, that the two offices of steward and port-reeve may be held by the same individual; for it is expressly averred that the two offices were held by one person: now that could not be true, if they were incompatible offices; for in that case, the moment that the person holding one office was appointed to the other, the former would become vacant. It must, therefore, be taken as a fact, that the two offices were held by one person, and if that person was competent to hold two offices, it follows, as of course, that he was equally competent to appoint a sufficient deputy.

ABBOTT C. J. It seems to me that this court was well constituted. It appears from the plea, that according to the usage, the court was to be held before the steward *and* port-reeve, or their deputy or deputies. Now, in fact, the court was holden before an individual, who was the deputy, not of *R. N. Thomas*, as steward only, but of *R. N. Thomas*, who combined the two offices of steward and port-reeve. If, indeed, it could be shewn that these two offices were incompatible, so that one person could not fill the two, it would follow, as of course, that the court was not legally holden. It does not appear, however, from the plea, that the offices are incompatible; for if the two offices of steward and port-reeve had been holden by two individuals, and each had appointed one deputy, the court then would have been holden before the two deputies; they were at liberty, however, to appoint one deputy only, and if they did so, the court would have been well holden before that one person. It seems to me, therefore, that when the two offices are united in the same person,

that

1819.

GREEN *against* DAVIES.

that person may appoint one individual to act as deputy; and that being so, there must be judgment for the defendant.

BAYLEY J. I have entertained considerable doubts on this question, but I am now perfectly satisfied, that the court was well holden. The plea states, that the court had been immemorially holden before the steward and port-reeve, or their sufficient deputy or deputies. Perhaps it would have been more correct to have used words of distribution; but I think the fair meaning of the words, "before the steward and port-reeve, or their deputy," is, that the court must be holden before either the steward or port-reeve, or their deputy, and it does not imply that the steward and port-reeve must be different persons. The plea further states, that *R. N. Thomas* was at that time steward and portreeve; now if the two offices are incompatible, it is not true that he was both steward *and* port-reeve, and the plaintiff might have taken an issue upon that fact. That allegation implies, that those were offices which might be united in the same person; it seems to me, therefore, to be the fair construction of the custom alleged in this plea, first, that the court may be holden before the steward *or* port-reeve or their deputy; and secondly, from the subsequent allegation, that the steward and port-reeve may be one and the same person. I think, therefore, there should be judgment for the defendant.

HOLROYD J. I am also of opinion that this plea is well pleaded. It is not alleged that the court must be holden before the persons being steward *and* port-reeve, but before the steward and port-reeve or their deputy

8 or

1819.

GREEN *against* DAVIES.

or deputies. Now if one person is both steward and portreeve, and the court is held before that person, it is in fact held before the steward and portreeve. Two persons (like the sheriffs of *Middlesex*) may execute one office, or the same individual may execute two offices. Here the court was held before one person, having the power of both offices, and if it was held before the principal himself, having the power of both offices, it comes within the words of the custom as pleaded. The plea, however, goes on to state, "before their sufficient deputy or deputies;" and the court was held before the deputy of the person who held both offices; for it appears he was the deputy not of the individual but the deputy of the officers. It was, therefore, held before a person who was the deputy of the two officers, and was, therefore, clearly within the custom as pleaded. It is said, however, that there is an incompatibility in the two offices being held by the same person, inasmuch as the public have a right to the judgment of two persons, either in the holding of the court, or in the appointment of a deputy. Upon these pleadings, however, I think it must be taken, that the offices are not incompatible, for it is alleged upon the plea, that *R. N. Thomas* was steward *and* portreeve. Now that could not be true, if the offices were incompatible, for one would immediately become vacant on the same person being appointed to the other. It appears to me, therefore, that this plea is sufficient, and that the defendant is entitled to the judgment of the court.

BEST J. It appears from the pleadings, that the person before whom the court was held, was the deputy of two offices, the steward and portreeve; that is, there-

1819.

GREEN *against* DAVIES.

fore, an admission of the existence of two offices, and if the two offices exist, although they be united in the same person, it is as if they had been held by two different individuals who concurred in the appointment of one deputy. He stands, therefore, in the situation of a person who has the authority delegated to him by another who has the two offices in his appointment. I think, therefore, that the plea is sufficient, and that the defendant is entitled to the judgment of the Court.

Judgment for defendant.

Saturday, November 6th.

MOORE *against* The Earl of PLYMOUTH. (a)

Where a plea, stated that *A.* was entitled to the equity of redemption, and subject thereto, that *B.* was seised in fee, and that they by lease and release granted, &c., the premises, excepting and reserving to *A.* and his heirs, &c. a liberty of hunting, &c.: Held, that as *A.* had no legal interest in the land, there could be reservation to him, and that this was a defective title, and not a title defectively set out, and that the plea was bad in substance.

TRESPASS for breaking and entering plaintiff's close, and with feet in walking and with the feet of dogs, treading down plaintiff's grass, &c.; and with guns hunting and searching for hares, pheasants, and partridges, and other game, and shooting off and discharging the guns, being loaded with gunpowder, and shooting at hares, pheasants, and partridges, in the same close, and killing and destroying the same, and converting and disposing thereof to his own use, &c. Plea first, not guilty; secondly, that on the 27th *February*, 1655, the Rt. Hon. *Thomas* Lord *Windsor*, being entitled to the equity of redemption of the premises by the indenture thereinafter conveyed, and *John Langham* and *Stephen Langham*, third son of the said *John Langham*, being seised in their demesne as of fee, subject to the said equity of redemption in the said pre-

(a) This case was argued at *Serjeants' Inn*.

1819.

MOORE *against* The Earl of PLYMOUTH.

premises, by a certain indenture, made between Lord *Windsor* of the first part, the *Langhams* of the second, and *Thomas Foley* and *Richard Jones*, of the third part, they the said Lord *Windsor* and *J. Langham*, and *S. Langham*, at and by the entreaty and appointment of the said Lord *W.*, granted, bargained, sold, aliened, released, and confirmed unto the said *T. Foley* and *R. Jones*, in their actual possession then being, by an indenture of bargain and sale for a year, all that park called *Bordsly Park*, with other premises, and amongst them the said several closes, in which, &c. *excepted always and reserved* out of the said first mentioned indenture, free liberty of hawking and hunting in, over, and upon any of the said premises, for the said *T.* Lord *Windsor*, party to the said indenture, and the heirs of his body, and his and their friends, servants, and followers. The plea then stated, that the premises thereinbefore mentioned, and in the indenture described, whereof the said several closes, in which, &c. are part and parcel by several mesne assignments vested in one *Henry Guest*, who demised the several places in which, &c. to plaintiff, who, by virtue of such demise, became and then was the tenant of the said *Henry Guest*. The plea then stated, that the defendant was the heir of the body of the said *Thomas* Lord *Windsor*, and justified the trespass as such, in the exercise of the liberty excepted and reserved. To this plea the plaintiff demurred, and the Court of Common Pleas gave judgment for the plaintiff. The record was then removed by writ of error into this court, and the case was now argued by

 Puller,

1819.

MOORE *against* The Earl of PLYMOUTH.

Puller, for the plaintiff, and *Blossett* Serjt., for the defendant in error. The point chiefly argued was, whether, under the terms hawking and hunting, the plaintiff in error had any right to shoot pheasants and partridges. Upon that question the Court pronounced no judgment. *Blossett* Serjt. objected, that this was pleaded as a reservation or exception, which it could not be, as Lord *Windsor* had only an equity of redemption, and no legal interest in the land, and there could be no reservation to a stranger; and that being pleaded as a reservation, it could not be taken to operate by way of grant; and he cited *Chester* v. *Willan* (a), *Monnington* v. *William* (b), and *Baker* v. *Lade*. (c) For the plaintiff in error, it was insisted, that these several authorities were before the statute of 4 & 5 *Anne*, c. 16., and that this was matter of form, and could only be taken advantage of by special demurrer.

ABBOTT C. J. I do not find it necessary to decide in this case, what would be the legal effect of a grant to a man and the heirs of his body, his friends, servants, and followers, to have the free liberty of hawking and hunting, because I am of opinion, upon this record, that the plea is bad in substance, inasmuch as it does not allege a grant, but a mere reservation, of a liberty. The person who excepts and reserves, appears, upon this record, to have had no legal interest in the land. It is a general rule that deeds should be pleaded according to their legal operation. It is said, that the cases which were referred to in argument, were

(a) 2 *Saund.* 96. (b) 1 *Vent.* 109. (c) 3 *Lev.* 291.

before

1819.

Moore *against* The Earl of Plymouth.

before the statute of *Anne*, and that this objection ought to have been taken on special demurrer. I think, however, that this plea is defective in substance, and not in form. It is not the case of a title defectively set out, but of a title defective in itself. If the defendant had wished the Court to construe the deed for him, he should have set it out in hæc verba, or at least so much as he meant to rely on; here, however, it is only alleged that Lord *Windsor*, having an equity of redemption, and *Langham*, the father and son, being seised in fee, by deed granted, bargained, sold, aliened, released, and confirmed unto *Foley* and *Jones*. Now that is very incorrect; for Lord *Windsor* himself had no legal estate in the premises. The plea, however, goes on to state "unto *Foley* and *Jones* in their actual possession then being, by virtue of an indenture of bargain and sale for one year, bearing date the day next before the date of the said indenture." Now this is a most incorrect mode of pleading, for it ought to have alleged first, the bargain and sale, and then to have stated the other instrument as a release. However that might, perhaps, be matter of form; it then goes on to shew the transfer "to *Thomas Foley*, of all that park, together with other premises, &c., and amongst others, the said several closes, in which, &c. excepted always and reserved out of the said indenture, free liberty of hawking and hunting, &c. upon the said premises, for the said *Thomas* Lord *Windsor*, his heirs, &c." The substance of the plea is, that *Lord Windsor* excepted and reserved to himself this right. The whole frame and import of the plea puts the defence upon the ground of an exception and reservation in the deed in favour of a person to whom no such reservation could

be

1819.

MOORE *against* The Earl of PLYMOUTH.

be made, for he had no title or interest in the land. It appears to me, therefore, that the plea is substantially bad, and that the judgment of the Court below ought to be affirmed.

BAYLEY J. The plea purports to set out the deed, according to its legal operation, and it states that legal operation to be, that there is excepted and reserved to Lord *Windsor* a certain right. Now when we look at the deed as set out upon this plea, it is quite clear, that it cannot have contained any exception or reservation of any such right, and therefore, it cannot have any such operation as that alleged in the plea. It is said, however, that it may operate by way of grant. We can form no judgment what operation it might have, unless we saw the very words of the deed. The deed not being before us, we are not at liberty to ascribe to it an operation different from that ascribed to it by this plea.

HOLROYD J. I have entertained some doubt, whether this objection ought not to have been shewn by special demurrer. I am now, however, satisfied that it is not a mere matter of form, and that no legal title is set out in the plea. In deducing title, I have understood it to be an established rule, that conveyances are to be pleaded as they operate. It is so considered, by Lord C. B. *Comyns*, in his *Digest*, tit. *Pleader*, c. 37. That rule, however, does not apply to an action on a deed of covenant; in such an action it is stated, that by a certain deed it was witnessed, that the party covenanted; the title in that case is not deduced. The title, however, must be deduced in a plea, when the defendant

insists

1819.

MOORE *against* The Earl of PLYMOUTH.

insists that he had a right to enter upon the premises; here it is stated, in this plea, that Lord *Windsor* was entitled to the equity of redemption, and that subject thereto the *Langhams* were seised in fee, and that they granted, &c. Now that allegation cannot be true, for Lord *W.* having only an equity of redemption, could not grant, &c. The deed must operate as a release, not from Lord *W.* but from the two *Langhams* only; that allegation, therefore, cannot be true, and if so, there is no conveyance on the face of the plea to any one. Now the words of exception and reservation, in whatever way they operate, can have no effect, unless the allegation be true as to the conveyance itself; non constat that there was any conveyance. If there was a good conveyance, it should have been pleaded as such; for unless there were such good conveyance, the deed could not operate by grant or by any other mode. I think, therefore, that there is no sufficient conveyance pleaded, and consequently that this is not the case of title defectively set out, but of a defective title, and that being so, the judgment of the court below must be affirmed.

BEST J. concurred.

Judgment for the Plaintiff.

1819.

Saturday, November 6th.

JOHNSON *against* W. DEALTRY CLERK and T. C. R. REID CLERK, J. GRAY, and W. WARE. (a)

A district, situate within the local limits of the county of *York*, from time immemorial had been part of the county of *Durham*, yet had always contributed to the public burdens of the county of *York*: Held, that it was to be presumed that such district, either in the original division of land into counties, or at some subsequent period (when it was separated from the county of *York*), was made part of the county of *Durham*, on condition of its contributing to the burdens of the county of *York*, and that such district was liable to the county-rate of *Yorkshire*.

TRESPASS for taking two horses of plaintiff, on the 3d of *May*, 1815, at *Craike*, in the county of *Durham*. Plea, not guilty. The cause was tried at the *Northumberland* assizes, 1817, when a verdict was found for the plaintiff, 13*l.* 10*s.* damages, subject to the opinion of the Court on the following case.

The plaintiff was petty-constable of the district of *Craike*, and the defendants justified the trespass under a warrant of distress issued by two of them, who were justices for the North Riding of *Yorkshire*, in consequence of plaintiff's refusal to pay the amount of the assessment of *Craike* to the county-rate of the North Riding. The district of *Craike* is a manor, and ancient possession of the Bishops of *Durham*, situate in the North Riding and in the Wapentake of *Bulmer*, at some distance from the body of the county of *Durham*, *but from time immemorial it has been and is a part of the county of Durham*. There are justices of the peace resident in, and exercising jurisdiction over, the district of *Craike*, who are appointed by and act under the commission of the peace for the county of *Durham*, and not for the North Riding of *Yorkshire*. The freeholders of *Craike* have always voted in county elections for *Durham*, and not for *Yorkshire*. The fines of lands in *Craike* have always

(a) This case was argued at Serjeants' Inn [illegible] een

been levied in the courts of the county-palatine of *Durham*. At the trial, various instances were produced of prosecutions for offences committed at *Craike*, which had been tried at *Durham*, and in which costs were paid to the prosecutor out of the county-rate; and, on the other hand, similar instances were produced, from which it appeared that the justices of the North Riding had exercised a jurisdiction, both civil and criminal, with respect to matters arising within the township of *Craike*, and that from the year 1615, the inhabitants of *Craike* were assessed to the rates of the North Riding. In 1674, the rate was raised from 35*l.* to 60*l.*; and in 1737, the inhabitants of *Craike*, having refused to pay their usual assessment, the magistrates of the North Riding ordered a case to be prepared for the opinion of counsel. On the 27th *April*, 1742, three years after the passing of the 12 *G.* 2. c. 29., the inhabitants of *Craike* again refused to pay the rate. The magistrates directed any two justices to grant a warrant of distress to levy, and that the Court should indemnify the chief constables in levying the distress. On the 8th *October*, 1745, by order of sessions, reciting that the township of *Craike* had long been reputed part of the county of *Durham*, yet that it had always been taken as part of the wapentake of *Bulmer*; and had always been, from time immemorial, assessed to, and paid all manner of public taxes charged for the North Riding, as part of that wapentake, until about nine years before, and that nothing had since been done by the proper officers employed for recovering the same; it was ordered, that the chief constable employed to levy the same should be indemnified. By another order of sessions, made at the *York* Midsummer adjourned sessions,

1819.

JOHNSON *against* DEALTRY.

sessions, 1747, reciting that the constables of *Craike* had absolutely refused to pay their proportion of the county-rates for the space of eight years, and that thereupon the Court had ordered, that the justices residing in the said wapentake should be empowered to grant such warrants, and pursue such measures, as they should think proper for the recovery thereof; and that certain magistrates, therein mentioned, did grant their warrant, empowering the chief constables of the wapentake to make distress upon the goods of the constable of *Craike*, for satisfying the arrears of the rates; and that, accordingly, a distress had been made upon his goods, but that he still refused to pay the same, upon pretence that *Craike* was always reputed part of the county of *Durham*, and therefore not liable to the payment of rates in the county of *York*; that a replevin was sued forth for the goods distrained, and a suit in law was commenced to settle the right in question; but that the petty constable, being better advised, had, with the consent of the rector and the principal inhabitants, applied to the justices to cease all further proceedings, and had submitted to pay the rates and arrears thereof, and for the future to continue to pay the same as they should become due, as anciently, from time immemorial they had, and of right ought to have done; it was then ordered, that all further proceedings should cease, and that the constables, churchwardens, and overseers, and other substantial inhabitants of *Craike*, should tax every inhabitant of the said parish to raise the sum assessed. At the same sessions, there was a petition of the freeholders, copyholders, poor tenants, farmers at rack-rent, inhabiting the town and parish of *Craike*, stating

that

that they had been inadvertently drawn in to bring on themselves a law-suit, in consequence of the non-payment of the county-rates, which they were advised not to pay, as their parish was reputed to be parcel of the county of *Durham*, and not of the county of *York*; but, that being now convinced of their error and mistake, and satisfied that they ought to pay the county-rates of the North Riding, they promised for themselves and their successors to pay the rates constantly, as they were anciently accustomed to do, and also to pay the arrears due; and prayed the justices to remit part of the arrears. Then followed an order of sessions, that the arrears should be discharged upon payment by the petitioners of one half of the assessment. The district of *Craike*, from the time of the conclusion of this dispute, always contributed to the county-rate of the North Riding, as if it had been a part thereof. With respect to the payment by *Craike* before the said dispute, and also before the 12 G. 2. of those rates, for which the general county-rate was in that year substituted, the following documents were produced in evidence at the trial. A book called "Nomina Villarum," found amongst the records of the North Riding sessions, the antiquity of the beginning of which was uncertain, but in which, at all events, there were entries in 1727 and 1735, and which purported to contain accounts of the several towns within every division of the North Riding. In this book, *Craike* was enumerated as one of the towns within the wapentake of *Bulmer*. By an order, dated in 1735, it appeared that several sums were estreated throughout the whole North Riding for certain

1819.

JOHNSON *against* DEARDEN.

1819.

JOHNSON *against* DEALTRY.

certain purposes, viz. 1st, a relief of prisoners in *York* castle; 2d, hospital money; 3d, wages of governor of house of correction; 4th, bridge money; 5th, charges of soldiers' baggage; 6th, money for the conveyance of vagrants; 7th, for purchase of a register house. At the end of that order, followed a computation of the proportion in which the different divisions of the North Riding were to contribute to these estreats, and the proportion of *Bulmer* was computed among the rest; but there was no computation for the proportion of the townships in the several divisions, and the name of *Craike* was not mentioned. The defendants, also, produced the duplicates of the assessment of the North Riding to the land-tax, from the time of the passing of the first land-tax act, 4 *W. & M. c.* 1., in regular succession, down to the time of the trial, from which it appeared that the township of *Craike* had been uniformly assessed to the land-tax, together with the rest of the wapentake of *Bulmer*, and paid its proportion to the chief constable of that wapentake. In the appointments of the collectors of the land-tax, *Craike* was described as the township of *Craike*, in the county of *Durham*, and within the land-tax collection of the division of *Bulmer*. The case was argued by —

Grey, for the plaintiff. The distress being made before the passing of the 55 *G.* 3. *c.* 51., must be justified under the 12 *G.* 2. *c.* 29. Now, it is stated as a fact, that *Craike*, though situate in the North Riding of *Yorkshire*, has from time immemorial been, and still is, part of the county of *Durham*. That fact is recognised by the legislature in several public acts of parliament,

 two

1819.

JOHNSON *against* DEALTRY.

two of which are the militia acts, the 42 *G.* 3. *c.* 90. *s.* 151., and 2 *G.* 3. *c.* 20. *s.* 133. As *Craike*, therefore, is part of the county of *Durham*, it cannot be liable to the general county-rate of the North-Riding of *Yorkshire*. The 12 *G.* 2. *c.* 29. *s.* 1., reciting several other acts, and that inconvenience had arisen from collecting the several rates imposed by them, empowers justices to make one general rate, in lieu of the several separate and distinct rates directed by the recited acts to be made, and by *s.* 5. provides, that nothing contained in the act shall extend to make persons or places liable to pay to any rate to be made in pursuance of that act, to which such person or place was not liable to contribute before the passing of the act. Now, if any of the old rates were such as *Craike* could not be liable to pay to the North Riding, it cannot now be liable to contribute to the general rate, which was substituted for them. One of those rates is that imposed by 11 and 12 *W.* 3. *c.* 19., for building and repairing gaols, and it enables justices to distribute and charge the rate upon the several hundreds, lathes, wapentakes, or other divisions *of the said county*. Another of the old rates was that imposed by the 43 *Eliz. c.* 2. *s.* 12., by which the justices of every county shall rate every parish; so that the rate of such taxation of the parishes, *in every county*, do not exceed the rate of two-pence for every parish within *the said county*. By the 7 *Jac.* 1. *c.* 4. *s.* 6., one of the purposes to which this rate is made applicable is, to afford allowances to the governor of the *county* houses of correction. Another of the old rates is that imposed by the 14 *Eliz. c.* 5. *s.* 37., by which the justices of *every shire* are empowered to rate every parish within *the said shire*, and the

1819.

Johnson against Dealtry.

the money is to be applied to the relief of prisoners committed by the said justices. The 19 *Car.* 2. *c.* 4. *s.* 1. affords a similar instance. These rates were not common-law burthens, but were created (unless the duty of repairing the county gaol be an exception) by the statute regulating the mode of collecting the rates; and the question of liability must be tried by the language of the statutes. Now, as those statutes uniformly confine the jurisdiction of the magistrates in assessing and collecting them to places within their own counties, it is impossible that part of the county of *Durham* can be legally liable to pay rates to the North Riding of *Yorkshire.* The 12 *G.* 2. *c.* 29. *s.* 2. expressly enacts, that the distress is to be made by warrant of two or more justices of the *county*, *riding*, *division*, &c. The distress, therefore, cannot have been lawful, unless it can be shewn that the two magistrates of the North Riding, who signed the warrant, were magistrates of the county of which *Craike* forms a part, which is contrary to the fact found that *Craike* is part of the county of *Durham.* Admitting it to be true, that some rates had been immemorially paid to the North Riding by *Craike*, that would not establish its liability to contribute generally to the modern county-rate of the North Riding: such a liability involves a presumption, that there was a time when *Craike* was not a part of the county of *Durham*, which is contrary to the fact found in the case. The king could not, by any reservation in a charter made before the period of legal memory, determine the district to which *Craike* should be liable to contribute, in respect of rates which were not then in existence; and, in that respect, this case differs from *Sherry* v. *Richardson*,

1819.

JOHNSON against DEARLEY.

son (*a*), and *Rex* v. *Gough*. (*b*) Even if the crown had the power of making such a reservation at the time, still the statutes by which the county-rates have at different times been imposed, ought to be construed as annulling that reservation, because they expressly limit the jurisdiction of the magistrates, in such matters, to the county or place of which they are magistrates. There is no authority for saying that a place can belong to two counties, because there is no saving in any of the statutes before 12 *G.* 2. *c.* 29., either general or special, which could apply to the case of a part of one county paying to another county; and because the most striking anomalies will arise from the liability of a part of *Durham* to contribute to the general county rate of the North Riding. For instance, by 18 *G.* 3. *c.* 19. *s.* 7. courts are empowered, in prosecutions for felony, to order the county treasurer to pay the prosecutor his expences, which sum the treasurer is to be allowed in his accounts. Now, as *Craike* is part of the county of *Durham*, and as it is admitted, in *Rex* v. *Gough* (*c*), that "the king cannot, by his charter, give Judges a power to try in one county offences committed in another;" it follows, that felonies committed in *Craike* must, except in cases specially provided for by statute, be tried in the county of *Durham*; and the prosecutor may have his expenses allowed out of the fund arising from the *Durham* county rates. This, in fact, is stated in the case to have happened in several instances. Again, under 14 *Eliz.* *c.* 5., prisoners sent from *Craike* must be relieved out of the *Durham* rates, to which *Craike* could not contribute, supposing it liable to contribute to the North

(*a*) *Popham*, 16. (*b*) *Doug.* 791. (*c*) *Doug.* 791.

Riding.

1819.

JOHNSON *against* DEALTRY.

Riding. It would, however, contribute to the North Riding rate, from which it could receive no benefit. Again, under 43 *Eliz. c.* 2. *s.* 12., and 7 *Jac.* 1. *c.* 4. *s.* 6., similar consequences would follow, and in addition, the assessments of North Riding magistrates must have depended, for execution, upon the orders of the *Durham* magistrates residing in *Craike*. Again, if *Craike* be liable to contribute to the county rate of the North Riding, it must either have been liable to contribute to the building of the register house of that riding, without having the privilege of having the memorials of the conveyances of lands situate there, registered: or *Craike* must have been entitled to that privilege, and all conveyances of lands there must be void, which have not been so registered; and yet, as the case states, "the fines which have been levied of lands situate in *Craike*, have always been levied in the courts of the county palatine of *Durham*." For the act which established the public registering of conveyances of lands within the North Riding, is the 8 *G.* 2. *c.* 6., by *s.* 3. of which it is enacted, that the charges of erecting and establishing the register office, shall be at the public charge of the North Riding, which charges shall be raised by the justices of the peace of the North Riding, in such manner as they are empowered to raise money for the repairs of county bridges. If *Craike* is liable to contribute to the county rates of the North Riding, and that liability is to rest on an implied reservation before the time of legal memory it is difficult to say in what way that reservation could have been worded, so as to include all subsequent county rates, without applying to this case also; and, in point of fact, the extract from the book entitled "*Nomina Villarum*,"

[illegible]

rum," which is inserted in the case, shews, if it shews any thing, that *Craike* did really contribute to the building of the register house, for the North Riding.

Tindal, contrà. After observing that *Craike* had, from the earliest period of which there was any evidence, been assessed to the burdens of the North Riding, was stopped by the Court.

Abbott, C. J. This action seeks to set aside the usage which has prevailed, not only as far back as the memory of living persons can go, but as far back as any written document applicable to the subject can be found. Now we certainly ought not to overturn that usage, if, by any reasonable intendment, it can be supposed to have had a legal commencement. In the opinion that I am about to deliver, I wish to be understood, as not deciding on the question of the jurisdiction civil or criminal, of the magistrates of the North Riding, over the township of *Craike*. My judgment is confined solely to the point, whether *Craike*, admitting it to be parcel of the county of *Durham*, for some purposes, is assessable to the rates of the county of *York*. I am of opinion, from the evidence laid before us, that *Craike* is liable to contribute to the county rates of the North Riding. From time immemorial *Craike* has been parcel of the county of *Durham*; whether it became so at the time of the original separation of the land of the two counties of *Durham* and *York*, or whether, having been originally part of the county of *York*, it was made part of *Durham*, when the latter became a county palatine, in consequence of being parcel of the possessions of the Bishop of *Durham*, we

 do

1819.

JOHNSON *against* DEALTRY.

do not know. When either of these events, however, took place, it may possibly have happened, that it was then settled that *Craike* should be contributory to the burdens of the county of *York*, and not to those of *Durham*. Then, if that may have been done, the question, on the evidence before us, is, whether we ought not to conclude, that what might lawfully have been done at one or other of those periods, was in fact done. All the usage leads to that conclusion, and there is nothing against it. A very strong argument, also, in favour of that conclusion, is deducible from the act establishing the land-tax, which became a substitute for aids and other rates which were of a local nature, and were collected in separate districts. Now the 4 *W. & M. c.* 1. *s.* 28. (which was the first land-tax act) provides, that "all places, constablewicks, divisions, and allotments, which have used to be rated and assessed; shall pay and be assessed in such county, hundred, rape, wapentake, constablewick, division, place, and allotment, as the same hath heretofore been assessed in, and not elsewhere." From the time of passing that act to the present moment, the district of *Craike* hath always been assessed in the North Riding; and the only mode of accounting for that is to suppose, that, before the passing of that act, it was assessed to the public burdens of the North Riding, and not to those of *Durham*. None of the documents go so far as to shew, that there ever was a time at which this township was not assessed to some of the public burdens of the North Riding; for it appears at all times to have been assessed to the repairing of bridges, and the character of that species of evidence is much higher than that of all the other in a question relating to a county rate; for the repairing of bridges is coeval with the common law.

If then, from time immemorial, the rates assessed locally upon the township of *Craike*, were applicable to the North Riding, it seems to me that it may fairly be presumed, that it was specially reserved and provided, either on the original separation of the land into counties, or on the taking away of the district from the North Riding, and placing it in the county of *Durham* (if that did in fact take place), that it should contribute to the burdens of the North Riding, and not to those of *Durham*; and, if so, we ought to conclude, that such reservation was made, and, to give effect to it, we must decide that this district ought to contribute generally to the rates and burdens of the North Riding. It will not, however, follow, from our decision, that the inhabitants of *Craike* must, therefore, contribute to the register house. My opinion goes only to the liability of contributing to the county burdens. I wish to be understood, as pronouncing no opinion on that question, or on the question as to the jurisdiction of the magistrates in civil or criminal cases.

BAYLEY J. This is partly a question of law, and partly a question of fact; as a jury, however, upon the evidence stated, could only find a verdict one way, and, if they found otherwise, it would be the duty of the Court to grant a new trial, it seems to me, that we are at liberty, without breaking in upon the province of the jury, to deliver our judgment on the case as now stated. The 12 G. 2. c. 29. directs the justices to levy the county-rates within the limits of their respective jurisdictions. The question of fact, therefore, is, whether for the purposes of the county-rate the township of *Craike* is within the jurisdiction of the North Riding

magis-

1819.
JOHNSON against DEALTRY.

magistrates. It seems to me that the evidence is all one way. I think it quite clear, for the reasons already given by my Lord Chief Justice, that a place may be in one county for certain purposes, and for certain other purposes not in the county. *Craike* is within the local limits of the North Riding, yet from time immemorial it has been part of the county of *Durham*. Whether it was made part of that county on the original division of the kingdom into counties, we cannot exactly tell; it has always, however, been part of the county of *Durham*: yet, as far back as there can be any trace, it has constantly contributed to the burdens of the North Riding. Now whether this took place on the original distribution of the kingdom into counties, or whether it became so on any subsequent separation, it may, in either case, have been made part of the condition on which it was made parcel of the county of *Durham*, that it should continue its contributions to the North Riding. Now, on the question, whether we are to consider this township to have contributed to the burdens of the North Riding from time immemorial, the usage is all one way. The 12 *G*. 2. *c*. 29. passed in 1739, and in 1747, within eight years after the passing of that statute, a dispute takes place on this very point, and it appears, that the constables of *Craike* had refused to pay the county-rates for eight years, and that a distress was made upon the goods of the constable of *Craike*, who refused to pay on the ground that *Craike* was part of the county of *Durham*. A replevin was sued out to try the question, but the constable of *Craike*, with the consent of the rector and principal inhabitants, applied to the justices to cease all further proceedings, and submitted to pay the rates as from time

181[illegible]
Jo[illegible]
[illegible]
D[illegible]

time immemorial they had done. These proceedings must have made the subject notorious to the inhabitants of the district of *Craike*, and the counties of *York* and *Durham*. They must, at that time, have inquired as to what was the immemorial usage. There is then a petition from the inhabitants of *Craike* stating that they had been inadvertently led to dispute the right, but that they were convinced of their error, and they promise for themselves and their successors, to pay the rates [illegible] North Riding for the future, and then the prayer of the petition is to remit the arrears. It appears, therefore, that when this was made matter of contest in 1747, the inhabitants of *Craike* acquiesced in the rate. If the case stood here it would have furnished very strong evidence of an immemorial usage to contribute to the burdens of the North Riding. But it does not rest here; for, from the commencement of the land-tax in 1692, the inhabitants of *Craike* have invariably contributed to the North Riding collection. Now the 4 *W.* & *M.* c. 1. provides, "that all places shall contribute to those counties and places to which they have been anciently used to make their contributions." If, therefore, under the first assessment, the inhabitants of *Craike* were rated to the North Riding, and not to *Durham*, it is an admission on their part, that they have been anciently used to pay their contributions to the North Riding. It cannot be said, that this was paid inadvertently, for what was the county of *Durham* doing from the commencement of all time in that respect? The township of *Craike*, a parcel of the county of *Durham*, and therefore, generally speaking, liable to contribute to the Durham burdens, has never contributed to them. Although liable to

 be

1819.

JOHNSON *against* DEALTRY.

be called upon for a contribution for the land-tax, it is still never done. The North Riding, which, apparently, would not be entitled to call upon the district of *Craike* for contribution in that respect, is constantly calling upon them. There is also another document not immaterial in this case; it is that which directs the rate to be raised from 45*l.* to 60*l.* Now is it likely that the inhabitants of *Craike* would consent to pay such an increased contribution unless they had known that there was a usage which bound them to make that contribution? Without, therefore, entering into the question, how far the magistrates of the North Riding have jurisdiction in the township of *Craike* it appears to me quite clear, that, for the purposes of the county-rate, *Craike* is within the limits of the North Riding, and, consequently, that the present assessment was duly made.

HOLROYD J. I am also of opinion, from the statement made in this case, that the district of *Craike* is assessable to the county-rates of the North Riding of *Yorkshire*. The evidence on this subject is all one way. The statement in the case, as to the jurisdiction which the *Durham* magistrates have exercised over this district, does not, in my opinion, impeach the other evidence with respect to its rateability. Originally, the district of *Craike* might have been (and I think it must be taken to have been), part of the North Riding itself. For particular purposes, it might have been made part of the county of *Durham*, with the exception, however, of its liability to bear the burdens of the North Riding of *Yorkshire*. It is clear that it may, in point of law, have been so separated from the county of *York*. with

with a saving and exception of the rights of the inhabitants of the county out of which it is taken; for in Sherry v. Richardson (a), it is laid down, that as the king, by his letters patent, may make a county, and exempt this from any other county, so may he, in the making of it, save and exempt to him and his successors, such part of the jurisdiction or privilege which the other county, out of which it is exempted, had in it before; and in Rex v. Gough (b), it was expressly held, that the shire hall of the city of Gloucester, which, by charter, was made a county of itself, is for the purpose of trying causes within the county of Gloucester. That was an indictment for perjury committed in the shire hall, and the venue was in the county of Gloucester, and the Court there held, that the venue was well laid in the county, the shire hall continuing part of the county for the purpose of trial. Then if this might be so by charter, it might be so by prescriptive usage. Now if Crake became part of the county of Durham, by grant to the bishop, nothing could be more reasonable, than that, when it was so made for the purposes of jurisdiction, there should be a saving and general exception of its liability to contribute to the burdens of the North Riding; for otherwise, the burdens of the rest of the inhabitants would be increased by the separation. That being so, and it appearing from the evidence that Crake has always contributed to the county-rate of the North Riding, it results, as a presumption of law, that it is for that purpose part of the North Riding. At the trial the judge must have told the jury that they ought to presume that it had originally been

(a) *Popham*, 16. (b) *Dougl.* 791.

1819.

JOHNSON *against* DEALTRY.

part of the North Riding, and therefore, in law, bound to contribute to its burdens. If the jury, without any evidence, were to find a contrary verdict, it would be the duty of the Court to grant a new trial. We are bound, upon the evidence stated to us, to draw the same presumption of law. I am therefore of opinion, that the district of *Craike* is liable to contribute to the county-rate of the North Riding of *Yorkshire*, although, for other purposes, it is to be taken to be part of the county of *Durham*.

BEST J. The question appears to me rather a question of fact than a question of law. The difficulty in this case arises from *Craike* being part of the county of *Durham*. The only question of law is, Whether the king has the power to place a portion of one particular county under the jurisdiction of the magistrates of another county; and if he has, then the question of fact arises, whether in this case that has been actually done. Now I am clearly of opinion that, by the law and constitution of this realm, the king might give to the magistrates of *Durham* the power to exercise jurisdiction within this district. It appears to me that *Craike* was originally part of the county of *York*. Whenever it became part of the county of *Durham*, it may have been considered convenient to give to the magistrates of the county of *Durham* civil and criminal jurisdiction within the district, and still not to exempt it from the burdens of the county of *York*; for it might have been most unjust so to do. All the evidence shews that that has been done for certain purposes, and there is not any instance of its having ever contributed

buted

buted to the burdens of *Durham*. I, therefore, think that this district was properly assessed to the county of *York*.

Judgment for the Defendants.

1819.
Johnson against Dealtry.

MALKIN *against* VICKERSTAFF. (a)

Saturday, November 6th.

Two divisions within a parish had separate overseers and separate rates, and managed their poor separately; but, at the end of every year, in making up their accounts, the overseers of the one (if they had money in hand) paid the balance over to the overseers of the other. Held, that this was in effect one joint parochial account, and that all the overseers were to be considered as joint overseers of the parish at large. Held, also, that where a payment has been made by a party, at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them till after they are out of office, it is a question proper for the jury to say, whether, under these special circumstances, the party ought not to be considered as having relied upon the sole responsibility of the overseer at whose request the payment was made.

ASSUMPSIT for goods sold and delivered, with the usual money counts. Plea general issue. On the trial, at the last Spring assizes for the county of *Stafford*, before *Garrow* B., the following facts appeared. The parish of *Ipstones* contains two divisions; the one called the township of *Ipstones*, the other the township of *Morredge and Foxt*. In 1817 the defendant and *John Harrison* were appointed overseers of the latter division, and *John Prince* and *William Vickerstaff* of the former. In the course of that year *Prince* gave authority to the plaintiff, who lived near *Cheadle*, to pay 2*s*. 6*d*. per week to a pauper belonging to *Ipstones*, then residing at *Cheadle*. In pursuance of this order the plaintiff had paid 10*l*. 14*s*., for which the action was brought. The action was not commenced till *Hilary* term last. It appeared also that these two divisions of the parish had separate rates, and made separate payments to the poor residing in each division respectively, but at the end of the year the overseers of both divisions

(a) This case was argued at *Serjeants' Inn*.

met

1819.

MALKIN *against* VICKERSTAFF.

met together, and then, if one division was "out of purse," and the other had money in hand, the balance was paid over by the latter to the overseers of the former. The defendant was not proved to have had any knowledge of the relief ordered by *Prince*, or to have assented to it afterwards. The jury found a verdict for the plaintiff. *Russell*, by leave of the learned Judge, in last *Easter* term, obtained a rule nisi for entering a nonsuit, on the ground, 1st, That these were two separate townships; and, therefore, the overseer of one could not be liable for relief ordered by the overseer of the other; and, 2dly, that if all the overseers were to be taken to be overseers of the parish at large, still there was not such a privity between them as to make one liable for the contracts of the other, of which he had no knowledge; and more especially when the action was not brought till long after the year of office had expired. No claim, however, was made at the time of the trial of going to the jury on this latter point, the principal question then being as to the first point.

Peake and *Puller* shewed cause. As to the 1st point, it appears that, in fact, at the end of every year, the money raised by the rates was brought into one general account, and that if a balance was in the hands of either party it was paid over to the other. This, therefore, is in effect having one general fund for the whole parish, and all that exists is only referable to an arrangement between the parties for their own mutual convenience. If that be so, there is no pretence for saying that these are, in point of law, separate

rate

1819.

MALKIN *against* VICKERSTAFF.

-rate townships, *Rex* v. *Newell* (*a*), *Peart* v. *Westgarth* (*b*), *Rex* v. *Justices of Middlesex* (*c*), *Rex* v. *Uttoxeter*. (*d*) As to the 2d point, *Watson* v. *Turner* (*e*) is an authority to shew that one overseer is bound by the promise of the other. They also cited *Atkins* v. *Banwell* (*f*) and *Simmonds* v. *Wilmot*. (*g*)

Jervis and *Russell*, contrà. Here there are separate appointments of overseers for each township, and the money is raised by separate rates, and the poor separately maintained. This case, therefore, is materially distinguishable from those cited; because there there was one joint account. And in *Rex* v. *Newell* it is expressly stated that the whole expenses of maintaining the poor, when incurred, were computed into one integral sum; and there also the division contributed to that sum in certain fixed proportions. As to the 2d point, *Watson* v. *Turner* is very different from this case; for there *Turner* was the sole acting overseer; and, besides, the action was brought during the time both overseers were in office. Here, however, *Prince* was not the sole acting overseer. It will be extremely inconvenient if the Court shall hold that one overseer is liable for such a contract as this, with which he is wholly unacquainted until after his year of office is expired. It is then quite out of his power to raise any rate for the purpose of reimbursing himself. One overseer may perhaps make a great many improvident contracts, which may not come to the knowledge of the

(*a*) 4 *T. R.* 266.
(*b*) 5 *Burr.* 1610.
(*c*) 1 *Bott.* 59.
(*d*) *Doug.* 346.
(*e*) *Bull. N. P.* 129.
(*f*) 2 *East*, 505.
(*g*) 3 *Esp. N. P. R.* 92

others

1819.

MALKIN *against* VICKERSTAFF.

others till after the fourteen days have expired within which, by the statute of the 17 *G.* 2. *c.* 38., they are required to settle their accounts, and pay over the balance to their successors. Besides, in this case, the payment was to a pauper not resident in the parish, which is not within the ordinary scope of the overseer's duty. They also cited *Rex* v. *Beeston* (*a*), to shew that it was necessary that such a contract should be made by at least a majority of the overseers of the poor.

ABBOTT C. J. One of the questions which is now presented for our determination is, whether the present defendant is to be considered as a joint officer with *Prince* for the whole parish, or only as overseer for the division of *Morredge* and *Foxt*. Now I entertain no doubt, both on the view of the learned Judge's report, and on examining the annual account-book which we have been requested to look at, that he must be considered as overseer of the whole parish; for we see there that at the end of every year the balance in the hands of the overseers of the one division is paid over to the overseers of the other. This, therefore, is in effect having one general fund for the maintenance of the poor of both divisions; and the case must, therefore, be considered as if all these four persons had been originally appointed joint overseers of the parish of *Ipstones*. Then another question is raised, whether, admitting this to be so, the defendant, under the special circumstances of this case, is chargeable for the contract made by *Prince*; and whether, from the length of time which has elapsed before the action was

(*a*) 3 *T. R.* 592.

brought,

brought, and the defendant's being now out of office, the plaintiff ought not be considered as having trusted to the sole responsibility of *Prince*. That, however, was a question of fact for the jury. And if it had been admitted at the trial that the defendant and *Prince* were joint overseers, the defendant's counsel might then have insisted upon this latter point. If that had been done, perhaps the plaintiff might have adduced more evidence upon this subject. I am, therefore, of opinion that this verdict ought not to be disturbed.

1819.

MALKIN *against* VICKERSTAFF.

BAYLEY J. I am of the same opinion. Upon the first question, there is no doubt; for the *Ipstones'* accounts which are produced, state the overseers to be out of purse 104*l.* 11*s.* 4¾*d.* and they add in reduction of this account "To a sum in hand with the *Morredge* overseer 68*l.* 11*s.* 10½*d.* leaving our balance out of pocket 35*l.* 19*s.* 6¼*d.*" And the *Morredge* account, after stating their balance in hand, speaks of the sum of 68*l.* 11*s.* 10½*d.* as "the balance due to the parish." This, I think, shews, beyond all doubt, that both these accounts form together one entire parochial account, and that the subdivision of the parish is a mere matter of arrangement; and I observe also, that nearly the same persons have examined and allowed both accounts. The second question was clearly for the consideration of the jury. And the amount of this verdict being under 20*l.*, no new trial can, according to the usual rule of this Court, be granted. It may, however, be a question very proper for the determination of a jury, where a party has paid money at the request of one overseer and makes no demand upon him, nor any application to the other overseers during their year of office, whether

he

1819.

MALKIN *against* VICKERSTAFF.

he ought not to be considered as having abandoned his claim upon the others, and relied solely upon being repaid by the overseer, at whose request the money was advanced. That, however, was not put to the jury upon the present occasion. And, therefore, I am of opinion that this rule must be discharged.

HOLROYD J. As the second point, upon which I should have entertained considerable doubt, namely, whether, under these circumstances, the jury ought not to find that the credit was given to *Prince* only, and not to the parish, was not made at the trial, the present case is narrowed to the consideration of the first point only. As to that point, I am clearly of opinion that although there were separate overseers and separate rates, yet that the whole money raised went as an entire fund to the maintenance of the poor of the parish at large. If so, the defendant and *Prince* must be considered as joint overseers for the parish, and the verdict is right.

BEST J. concurred.

Rule discharged.

1819

SAUNDERS and Others, Executors of THOMAS SAUNDERS, *against* BRIDGES and Another, Sheriff of MIDDLESEX. (*a*)

Saturday, November 6th.

Two writs of fi. fa., at the suit of different plaintiffs, were issued against one defendant: the goods were not more than sufficient to satisfy the first execution. The officer, under the second writ, continued in possession until the goods were sold by the sheriff. The defendant then obtained a rule for setting aside the first execution; and, pending that rule, there were conferences between all the parties. The rule, however, was made absolute, and the sheriff was ordered to pay to the defendant the proceeds of the levy. The sheriff, having so paid the money, without having applied to the Court for relief, and without having given any notice to the plaintiff in the second execution, was held liable to him for that amount, in an action for a false return of nulla bona.

ACTION on the case against the defendants, as late sheriff of *Middlesex*, for a false return of nulla bona to a writ of fi. fa. This cause was tried at the sittings at *Westminster*, after *Trinity* term, 1817, when a verdict was taken for the plaintiffs, subject to the opinion of the Court upon the following case:

In *Hilary* term, 1817, the testator, *Thomas Saunders*, recovered a judgment against one *Henry Morini*, for 250*l.* 5*s.*, and on the 5th of *February*, in the same term, issued a fi. fa. upon the judgment, directed to the Sheriff of *Middlesex*, to levy the amount. On the following day, the writ of fi. fa. was delivered by the plaintiff's attorney to the defendants, who granted a warrant thereon to one of their officers, under which he entered the house of *Morini*, and found that another officer of the sheriff of *Middlesex* had levied, and was in possession of the same goods, under a prior writ of fi. fa., at the suit of one *L. Williams*, and which writ had been delivered to the sheriff, on the 5th of *February*, 1817, and was indorsed, to levy 214*l.* 14*s.*. Notwithstanding the previous execution, the officer, under

(*a*) This case was argued at *Serjeants' Inn.*

1819.

SAUNDERS *against* BRIDGES.

under the second fi. fa., entered into possession, and continued in possession until the sheriff removed the goods for sale under the prior execution, and sold them to satisfy *Williams*'s writ. The produce of the goods, deducting rent and taxes, was considerably short of the sum indorsed on the first writ. Subsequent to the sale under the prior execution, a notice was served on the defendants, by *Morini*'s attorney, of an intended motion to the Court to set aside the judgment and execution issued at the suit of *Williams*, and that the money levied under that writ might be restored to *Morini*, and requiring the sheriff to retain such money until such application could be made to the Court. In *Easter* term, 1817, *Morini* accordingly applied for and obtained a rule for setting aside *Williams*'s execution. Pending the rule, there were frequent conferences between all the parties, namely, the parties to the first and second execution, and the defendants. The rule was at length made absolute, and the sheriff was directed by the Court to pay back to *Morini* the amount of the levy under *Williams*'s execution. The testator, *Thomas Saunders*, died on the 29th of *April*, 1817, leaving the plaintiffs his executors, and, after his death, they made several applications to the defendants, as sheriff, to pay over the balance of the proceeds of *Williams*'s execution, but which they refused, alleging that they had paid that balance to *Morini*, in pursuance of the rule of Court, and that he had no other goods in their bailiwick. On the 22d of *November*, 1817, the defendants, as sheriff, being ruled to return the writ of fi. fa. at the suit of *Saunders*, returned nulla bona.

Comyn,

Comyn, for the plaintiffs. The sheriff is liable. The first execution was set aside, and the money became thereby a fund in the sheriff's hand, to satisfy any execution lying in his office. It is true that the sheriff was bound to obey the rule of Court; but, inasmuch as the money was in his hands at the time, and the writ at the suit of *Saunders* likewise remained in his office, the money was impressed, as it were, with a specific lien in favour of the plaintiffs. The sheriff should have applied to the Court in the difficulty cast upon him by the rule obtained by *Morini*, and the Court would have protected him as a public officer; but, by paying the money to *Morini*, whilst a writ of fi. fa., actually levied on the goods, was in his office, as yet unsatisfied, he contravened his duty, and left the plaintiffs without any remedy but the present action. In *Jones* v. *Atherton* (*a*), the Court of Common Pleas decided, that if a second fi. fa. be delivered to the sheriff after he has the defendant's goods in possession, under the prior fi. fa. of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff, and that without warrant on the second writ, or further seizure. The sheriff could not make a further seizure, or acquire a more complete possession. In this case, *Burrough* J. is reported to have said, "Suppose there had been a sale and an overplus, would not the overplus be bound by the second writ in the sheriff's hands, and applicable to satisfy that execution?" And the Court of *C. P.* assented to that observation.

(*a*) 7 *Taunt.* 56.

1819.

SAUNDERS *against* BRIDGES.

Holt, contrà. The first execution swallowed up all the effects of *Morini*; and his goods, being converted into money, became an executed satisfaction in the hands of the sheriff, for the purposes of the first execution. There was nothing, therefore, on which the second execution could attach, and the sheriff could make no other return than *nulla bona*. Nothing could be clearer than that the sheriff could not take or retain money in execution; and, in this case, the sheriff, having sold the goods, and there being no other goods belonging to *Morini* in his bailiwick, had no fund to satisfy the second writ. *Knight* v. *Criddle* (*a*), and *Fieldhouse* v. *Croft* (*b*), are authorities in point. In the latter case, the Court refused to order the late sheriff to pay into the hands of the succeeding sheriff the surplus of a *former* execution against the defendant's goods, at the suit of the same plaintiff. The Court has often refused to order the sheriff to retain in satisfaction of a present writ of *fi. fa.*, money or bank notes, which the sheriff had before received for the use of the person against whom an execution had issued, upon the principle that goods only, and not money or bank notes, are subject to an execution. Here, too, the sheriff has acted only in obedience to the rule of Court, in paying over this money to *Morini*, which rule ought to protect him as a public officer. But supposing it should be a mere question, as to which of the parties should have applied to the Court, the circumstances of the case shew that it was the duty of the plaintiffs. For they were privy to all the proceedings of

(*a*) 9 *East*, 48. (*b*) 1 *East*, 510.

Morini,

1819.

SAUNDERS *against* BRIDGES.

Morini, in setting aside the execution; and the knowledge of the sheriff of this important fact was only to be presumed from his official character, and was not brought home to him *directly*, as it was to the plaintiffs.

ABBOTT C. J. It occurred to me, at first, that perhaps a valid argument might be adduced in favour of the sheriff in this case, from the different communications which are stated to have taken place between the parties whilst the rule in this Court was pending. I think, however, the best general rule we can lay down in a case of this kind is this, that if the sheriff is served with a rule requiring him to pay over money to a defendant, he ought to relieve himself from that part of the rule, either by an application to the Court, or by giving notice to the defendant that there is another writ in the office. That will be a good general rule, applicable to all cases, and will work no injury or inconvenience to the sheriff. But if we were to enter into an enquiry as to what communications took place between the sheriff and the respective attornies, we should be opening a wide door to litigation. It is more convenient for the sheriff to have a general rule, by following which he will always be safe. I am, therefore, of opinion, that the plaintiff is entitled to the judgment of the Court.

BAYLEY J. The duty of the sheriff is plain. He has two writs in his office. If the first be a good writ, there is not sufficient to satisfy the second execution; if it is a bad writ, there is sufficient. Now, the plaintiff having notice that there is an application to the Court in order to defeat the first execution, instead of taking away the writ from the sheriff's office, or calling for a

1819.

SAUNDERS *against* BRIDGES.

return of that writ, leaves it there, with a view to have the money levied applied to his writ, if ultimately it should be found not to be applicable to the first execution. It is ultimately found not to be applicable to the first writ. On that, the Court makes an order to the sheriff to pay the money over to *Morini*. The Court did not, however, know that there was any other writ, by virtue of which the money levied on the goods might be detained; but the sheriff did know that fact, and he knew that he might be called on to make a return upon that second writ at some future time. That being so, as the sheriff did not apply to the Court for directions, nor give notice to the plaintiff that he had been served with the rule to pay over the money to *Morini*, which would have enabled the plaintiff to make such an application himself, it seems to me that his paying the money was in his own wrong, and that the plaintiff is entitled to our judgment.

HOLROYD J. I am of the same opinion. The execution on the first judgment being set aside, the money was applicable to the second execution only; and the plaintiff, having that right against the sheriff under his execution, ought not to be deprived of it by the rule of Court, which called upon the sheriff to pay the money over to *Morini*. The sheriff might have applied to the Court, and have shewn that the money, which he was ordered to pay over, clearly belonged to another person. It was his duty to have made the application, or, at least, to have given notice to the present plaintiff of the former judgment and execution having been set aside, and the order of the Court on him to pay the money

1819.

SAUNDERS against BRIDGES.

money over to the defendant in that action. The sheriff ought to have done this, in order that the present plaintiff might have applied to this Court, if he had thought proper to do so. It appears to me, therefore, that this action is maintainable, and that the plaintiff is entitled to the judgment of the Court.

BEST J. I am of the same opinion. The sheriff is called upon to do something by the rule of Court, which, if the Court had been aware of his situation, they would not have called upon him to do. It was for him to come and get rid of that order; and it is entirely owing to his own neglect, in not making such an application to the Court, that the money has passed out of his hands and the plaintiff been prejudiced. Under these circumstances, it appears to me that the present action is clearly maintainable.

Judgment for the plaintiff.

WIGLEY *against* ASHTON and Others. (a)

Saturday, November 6th.

A count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator.

ASSUMPSIT by plaintiff, against *Mary Noble Ashton*, widow, the Rev. *Henry Denny Berners*, clerk, and *Sarah* his wife, *William Berners*, and *Rachel Allen*, his wife, and *Henry Fitzwilliam Bernard*, and *Frances*, his wife, which said *Mary Noble*, *Sarah Rachel Allen*, and *Frances*, are the administratrixes of *Richard Miler*, deceased,

(a) This case was argued at *Serjeants' Inn*.

1819.

WIGLEY *against* ASHTON.

deceased, with the will annexed. The first count stated, that *Miler*, the deceased, was tenant to the plaintiff of certain premises therein mentioned, from year to year, and that he, the testator, promised to pay rent during the continuance of the tenancy; it was then averred, that the tenancy continued until the 28th *August*, 1818, and that a quarter's rent was due. The second count was also on a promise by the testator. It is unnecessary to state the third count, as the Court did not pronounce any judgment upon it. The fourth count stated, that the said *H. Denny*, *W. Berners*, and *H. Fitzwilliam*, whilst they were so married as aforesaid, and the said *Mary Noble*, *Sarah*, *Rachel Allen*, and *Frances*, as such administratrixes as aforesaid, were indebted to the plaintiff for the use and occupation, &c. of the premises by the said *H. Denny* and *W. Berners*, and *H. Fitzwilliam*, whilst they were so married as aforesaid; and the said *Mary Noble*, *Sarah*, *Rachel Allen*, and *Frances*, as such administratrixes, as aforesaid. Then promises were laid by the three husbands, and their wives, and *Mary Noble*, as administratrixes. To this declaration there was a general demurrer.

The Court, after hearing *Tindal* in support of the demurrer, and *Chitty*, contrà, who cited *Pearson* v. *Henry* (*a*), *Tugwell* v. *Heyman* (*b*), *Powell* v. *Graham* (*c*), and *Thompson* v. *Stent* (*d*), were clearly of opinion that this was a misjoinder, inasmuch as the fourth count made the defendants personally liable, and the first two counts made them liable only to the extent of assets.

Judgment for defendants.

(*a*) 5 *T. R.* 6. (*b*) 3 *Campb.* 298.
(*c*) 7 *Taunt.* 580. (*d*) 1 *Taunt* 322.

1819.

MANN *against* DAVERS, Clerk. (*a*)

Saturday, November 6th,

A conviction stated, that Plaintiff, having been brought before a magistrate on an information charging him with having unlawfully returned, without a certificate to a parish from which he had been removed, and that upon that occasion he confessed himself guilty: Held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to show, in his defence, that he did not return in a state of pauperism.

ACTION for false imprisonment. Plea, not guilty. The cause was tried before *Dallas* C. J. at the *Suffolk* Spring assizes, 1818, when a verdict was found for the plaintiff, 40*s.* damages, subject to the opinion of the Court on the following case:

The defendant was a magistrate of the county of *Suffolk*, and had committed the plaintiff to prison as an idle and disorderly person under the 17 *G.* 2. *c.* 5. The defence was a regular recorded conviction of the plaintiff, and the information stated, that within three months the plaintiff unlawfully returned from the parish of *A.* to the parish of *B.* from which last-mentioned parish he had been legally removed to the said parish of *A.* by an order, &c. without bringing a certificate from the said parish of *A.* The conviction then stated that the plaintiff being brought before the defendant had confessed himself guilty of the offence. It appeared from the facts stated in the case that when the plaintiff returned to the parish, he was not in a state of pauperism, but that he maintained himself by his own labour, and that he was actually taken up upon the charge upon which he was convicted, when he was working in the harvest-fields. The question was, whether the conviction was a bar to the action.

Robinson, for the plaintiff. If the conviction be good on the face of it, it is a bar to the action. The

(*a*) This case was argued at *Serjeants' Inn*.

1819.

MANN *against* DAVERS.

case of *Gray* v. *Cookson* (*a*), however, is an authority to shew that if the conviction be bad upon the face of it, trespass will lie against the magistate, although the conviction has not been quashed, and that notwithstanding the 43 *G.* 3. *c.* 141. Here, however, the conviction is bad; for the information, which alone gives the magistrate jurisdiction of the cause, does not state any act of vagrancy committed by the plaintiff, but leaves it to be inferred only from the fact, that he returned without a certificate to the parish from which he had been removed. Now that is not a sufficient description of the offence, unless the mere act of returning is criminal under all circumstances, even though the party returning be very far removed from the state of pauperism. Lord *Kenyon*, in *Rex* v. *Fillongley* (*b*), said that there is nothing in an order of removal which prevents the return of a pauper if he do not return in a state of vagrancy, and in *Rex* v. *Angel* (*c*) this Court held a similar commitment irregular because it did not state that the pauper was chargeable or likely to be chargeable. The conviction here has followed the very words of the statute 17 *G.* 2. *c.* 9. In *Rex* v. *James* (*d*) *Buller* J. lays it down that where a particular act constitutes the offence it may be enough to describe it in the words of the legislature, otherwise where the legislature speaks in general terms. The statute 17 *G.* 2. creates no offence; it merely classifies, for certain purposes, a certain number of offences, and it refers to the subsisting law, when it renders the unlawful returning criminal, which seems to imply that there may be a lawful re-

(*a*) 16 *East*, 13.

(*b*) 2 *T. R.* 709.

(*c*) *Cas. temp. Hardw.* 124.

(*d*) *Calde.* 458

turning

turning. *Rex* v. *Chapman* (*a*) and *Rex* v. *Sparling* (*b*) are authorities to shew that it is not always sufficient to use the words of the statute in the conviction. Here the conviction should have stated wherein the unlawfulness of the returning lay, and not have left it to be implied from a circumstance in itself not criminal. In *Rex* v. *Speed* (*c*), it was held sufficient that the conviction stated that the defendant had unlawfully killed the fallow deer, but that was expressly on the ground that the killing was the gist of the offence; here the gist of the offence is chargeability.

Blossett Serjt., contrà, was stopped by the Court.

ABBOTT C. J. This information pursues the language of the statute, and in so doing, it does all that is necessary to be done. The returning to the parish without a certificate, was, at least, primâ facie evidence of his being an idle and disorderly person, and then it was for the defendant to shew that he had a lawful excuse for returning. It would be extraordinary indeed, if a person who refuses to answer, and suffers the magistrate to convict him, should afterwards be at liberty to bring an action against the magistrate; the defendant here confessed the substance of the charge, and when called upon for an excuse, he does not give one, but suffers imprisonment in order that he may afterwards bring an action against the magistrate. If we were to hold this information to be bad, it is impossible to say how many actions might be brought against magistrates under similar circumstances.

(*a*) 1 *East*, 647. (*b*) *Str.* 497. (*c*) *Carth.* 502.

BAYLEY

1819

MANN *against* DAVERS.

BAYLEY J. The facts of the case induce a suspicion, that it was one of considerable hardship on the party who had been removed. We must, however, consider the situation in which magistrates would be placed, if a party, who neglected to make his defence when he had the opportunity, could afterwards sue the magistrate. It seems that the parish officer had lodged before the magistrate a complaint, upon which, if established, the party was liable to punishment. The substance of the charge was that he had returned unlawfully; if he could shew any lawful excuse for his return he might have stated that before the magistrate: he, however, confesses that he is guilty of the offence charged upon which the law says that he is an idle and disorderly person, and I am of opinion, that he cannot now turn round and bring an action against the magistrate.

HOLROYD J. concurred.

BEST J. This conviction appears to be in the ordinary form; nevertheless, I must say that the parish officer acted most improperly in taking a man up as a vagrant, who was at work in the harvest-field. But when he was before the magistrate, and alleged no fact to shew that he was not, as he appeared to be, in a state of vagrancy, the magistrate could do nothing but convict him. Had he stated to the magistrate that he returned for the purpose of working, it would have been a question for the Court whether the magistrate should not have used the language of this Court in the case of *Rex* v. *Fillongley*.

Judgment for the defendant. (*a*)

(*a*) See, as to the offence of returning without certificate, *Rex* v. *Kenilworth*, 2 *T. R.* 598., and *Strickland* v. *Ward*, 7 *T. R.* 633. n., and, as to the sufficiency of following the words of the statute in convictions, *Rex* v. *Chauncey*, 2 *Raym.* 1368. *Mould* v. *Jennings*, cited *Cowp.* 612. *Rex* v. *Corden*, 4 *Burr.* 2279. *Rex* v. [illegible], 2 *B. & A.* 378.

1819.

The KING *against* The Inhabitants of EDGMOND. (*a*)

Saturday, November 6th.

A pauper, in consideration of weekly wages, agreed to serve *T. S.*, a bricklayer, for three years; but, in case he should neglect his master's business, or lose any time on his own account in any one week, during the first year, then that *T. S.* should deduct from his weekly wages in proportion; and *T. S.* agreed that he would pay wages in proportion to any over-work which the pauper might do in any one week. There were similar stipulations for the second and third years of the term; and it was also agreed that in case they could not work through severity of weather in any one year, in the winter time, then that *T. S.* should pay no wages during that time, but should permit the pauper to employ himself in any other business whatever: Held, that these were express exceptions in the contract, and that the pauper, by serving a year under it, did not gain a settlement.

TWO justices, by their order, removed *James Ankers* and his family from *Manchester* to *Edgmond*, in the county of *Salop*. The sessions, on appeal, confirmed the order, and stated the following case:

The respondents proved a case of settlement in the parish of *Edgmond*, by relief given to *William Ankers*, the grandfather of the pauper *James Ankers*. In answer to this, the appellants put in an agreement entered into by *James Ankers*, the pauper, with Messrs. *Jones* and *Evans*, who were bricklayers and plaisterers at *Stoke-upon-Trent*, and contended that, having served under it for a year and a half, he had gained a settlement by hiring and service in that place. The agreement was dated *July* 9th, 1803, and recited that the pauper, in consideration of certain wages, did agree to serve Messrs. *J.* and *E.* from the day of the date thereof, for the term of three years, if he should so long live. And it then stated that Messrs. *J.* and *E.* did agree to provide for the pauper during the first year of the said term the sum of 13*s.* per week; but in case he should neglect his masters' business, or lose any time on his own account, in any one week during the first year of the term, then he consented that Messrs. *J.* and *E.* should be allowed to deduct from his weekly

(*a*) This case was argued at *Serjeants' Inn.*

wages

1819.

The KING against The Inhabitants of EDGMOND.

wages in proportion to the time neglected or lost on his own account. And Messrs. *J.* and *E.* agreed that in case the pauper should earn any over-work in any one week during the first year of the said term, then they would pay him wages for such over-work equally in proportion to his daily wages, or weekly wages, during the first year of the term. There were similar stipulations for the second and third years of the term, the rate of wages only being altered for each year. The agreement also contained the following clause: "And it is hereby mutually agreed upon, by and between all the said parties, that in case they cannot work through severity of weather in any one year, in the winter-time, during the said term of three years, then the said *J.* and *E.* shall pay no wages unto the said *James Ankers* during such severity of weather, but shall and will permit and suffer the said *James Ankers* to employ himself in any other business whatever during such severity of weather with respect to frost."

W. D. Evans, in support of the order of sessions. The pauper gained no settlement in *Stoke-upon-Trent* under this agreement; for there were exceptions in the contract between the parties: first, the pauper was only bound to work certain hours, and if he worked less than the usual time, he was to be paid less than the stipulated wages; and he was also to be paid for all over-work that he might do. This shews, therefore, that he was not bound to work during the whole of any one day. Besides, it was stipulated, that in case of frost he should receive no wages, but be permitted to employ himself in any other business whatever. And

1 this,

1819.

The KING against The Inhabitants of ENGMOND.

this, therefore, was an express exception in the contract.

Tindal and *Abraham*, contrà. The question in all these cases is, whether the exception be expressed, or only implied from the nature of the service. For in all services there are some implied exceptions, which, nevertheless, do not prevent a settlement from being gained. *Rex* v. *Horwick* (*a*), *Rex* v. *All Saints, Worcester* (*b*). The case of *Rex* v. *Buckland Denham* (*c*) is distinguishable from the present; for there the pauper agreed to work shearmans' hours, and to be at his own liberty at all other times, which latter stipulation does not exist here. As to the second exception, relating to the frost, it is sufficient to say, that that was only a contingent exception, which, it appears, never happened. For it is found as a fact, that the pauper served a year and a half; and this is precisely similar in principle to *Rex* v. *Martham*. (*d*)

ABBOTT C. J. It appears to me, that in this case no settlement was gained by this service. For the agreement contains in substance an engagement by the pauper to work only during certain hours in each day, and I do not see what remedy the master could have had, supposing the pauper to have refused to work after the usual hours. It is necessary that there should be a covenant to serve for the whole year; but, taking the whole of this agreement together, it seems to me only to contain a promise to serve for a part of the year. I, therefore, think that the sessions have come

(*a*) 10 *East*, 489. (*b*) 1 *B. & A.* 322.
(*c*) *Burr. S. C.* 694. (*d*) 1 *East*, 239.

to

1819.

The King against The Inhabitants of Edgmond.

to the correct conclusion in this case, and that we ought to confirm their order.

Bayley J. The rule of law is, that if there be an express exception in the contract, it will not confer a settlement; but if it be not so, although by the usage of trade certain exceptions are impliedly introduced, still they will not prevent a settlement. The question, therefore, is, whether there be in this contract any express exception; and it seems to me that there clearly is one, namely, the period of frost. The contract, it is to be observed, is general, and not confined to a service in the particular trade of a bricklayer; and, at the conclusion of the agreement, there is this provision, that in case they cannot work through severity of weather, in any one year, in the winter-time, during the term, the master shall pay no wages to the pauper during that time, but shall permit him to employ himself in any other business whatever. Under this contract, therefore, he might engage to serve other persons, and so might contract inconsistent relations at one and the same time. I think, therefore, that this hiring was not sufficient to confer a settlement. The case of *Rex* v. *Martham* is distinguishable from the present, because there there was no such express authority as this to contract a relation of service with another master; besides, that was not a general contract of service, but to serve in the particular trade of a bricklayer. Upon the other point, I am also of opinion, that there is in this agreement an express exception as to part of the year.

Holroyd

1819.

The King against The Inhabitants of Edgmond.

Holroyd J. I am of the same opinion. There was not a sufficient hiring and service to gain a settlement in *Stoke-upon-Trent*. Taking all the parts of the contract together, it seems to me an express agreement to serve only during the usual hours. The pauper does not engage to serve for more than that period, for he is to be paid for all over-work; and the master could not compel him, under this agreement, to serve more than that time. As to the other point, I had at first doubts whether it was sufficient to invalidate the settlement; but I am now satisfied that it is. The provision is, that the pauper should be at liberty to employ himself with any other master during the time of frost; and that, therefore, would impliedly give to him a reasonable time, even after the frost was over, to finish the business he had so undertaken. Upon both these grounds, I think the hiring insufficient.

Best J. I am of the same opinion on both grounds. The master does not, in this case, stipulate for an entire service during the whole year, but only for certain hours during each day; and that, according to *Rex* v. *Kingswinford* (a), invalidates the settlement. As to the other point, the case of *Rex* v. *Martham* at first produced doubts upon my mind; but I am now quite satisfied that that case is distinguishable from the present in the circumstance, that here the servant was at liberty to serve any other master during the time of frost. As soon as the frost commenced, all control of the master over the servant would immediately cease. The decision of the sessions was therefore right.

Order of sessions confirmed.

(a) 4 *T. R.* 219.

1819.

Saturday, November 6th.

The KING *against* THOMAS MILTON. (a)

Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of *B*. Held, that a rate on the proprietor of those dues for their whole amount in the parish of *B.*, stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of *B*, but as a rate upon the parts of the river situate as well within as without the parish, and that it could not, therefore, be supported: Held, also, that the 41 *G.* 3. *c.* 23. *s.* 1. does not give the Court of K. B. the power of amending a poor-rate.

UPON an appeal against a rate made for the relief of the poor of the parish of *Bengworth*, within the borough of *Evesham*, in the county of *Worcester*, whereby one *Thomas Milton* was rated for "River tonnage at 100*l.* — 6*l.*" The sessions confirmed the rate, subject to the opinion of this Court on the following case:

The appellant was a yearly tenant under *George Wigley Perrott*, Esq., and *Jane Perrott*, widow, of that part of the navigation of the river *Avon* called the "Lower Navigation," which runs through the counties of *Worcester* and *Gloucester*, from the lock or sluice above the bridge at *Evesham* to the junction of the *Avon* with the *Severn* at *Tewkesbury*. The conveyance under which Mr. *Perrott*'s family held this property was dated the 17th *June*, 1760, and conveyed to them "all that the navigation and profits of navigation, and passage for boats, upon the *Avon*, situate in the counties of *Worcester*, *Warwick*, and *Gloucester*, to and from the *Severn*, up and down the *Avon*, unto and from the lock and sluice next above the bridge at *Evesham*; and also all storehouses, sluices, locks, &c., belonging to the river *Avon*, and the navigation thereupon to and from the *Severn*, up and down the *Avon*, unto and from the lock and sluice next above the bridge at *Evesham*, together with all the tolls, rates of tonnage, &c. to the navigation belonging." By an act passed the 24 *G.* 2., 1751, entitled, "An act for

(a) This case was argued at *Serjeants' Inn*.

the

1819.

The KING against MILTON.

the better regulating the navigation of the river *Avon*, running through the counties of *Warwick*, *Worcester*, and *Gloucester*, and for ascertaining the rates of water-carriage," it was enacted, "that the said river *Avon* shall for ever thereafter be a free river, and all persons shall have liberty of passing and repassing up and down the said river with boats, barges, lighters, and other vessels laden with coal, or any other sort of goods, and shall have liberty to sell and vend the same to any persons, at such reasonable prices as they shall think fit and can get for the same; and to land the same, with the consent of the owners or occupiers of the land, at such wharfs as shall be thought most convenient, paying, or securing to be paid, to the owners and proprietors of the navigation, certain rates of tonnage for all goods and merchandises carried on the said river." The appellant was not an inhabitant or occupier of any messuage or tenement whatsoever in *Bengworth*, but resided in the parish of *All Saints*, *Evesham*, on the opposite side of the river, which flowed between the two towns of *Bengworth* and *Evesham*, part of the river being within the parish of *Bengworth*, and other part of it being within the parish of *All Saints*, *Evesham*, both which parts were navigable, and used by vessels passing along the river. On the *Bengworth* side of the river, and within the parish, there was a wharf communicating with the river belonging to one *Day*, where goods were landed annually, yielding tonnage dues to the amount in the rate assessed; but no tonnage dues were received by the appellant in the parish of *Bengworth*, nor was any account given of them in that parish to the appellant; but, as a check upon the boatmen, an account was taken at the wharf, by *Day*'s servant, of all the goods landed there,

1819.

The KING *against* MILTON.

which was sent over to the appellant at his house, in the parish of *All Saints, Evesham*, where the boatmen accounted to him; and he usually received all the tonnage dues on goods brought up the river from *Pershore* to *Evesham*, and landed either in the parish of *All Saints, Evesham*, or in the parish of *Bengworth*; though, if he did not happen to be in the way when the boatmen called to give an account of and pay the tonnage dues, at the office in *All Saints, Evesham*, they accounted for and paid them on their return back, after unlading, at the appellant's office in *Pershore*, where he collected the tonnage dues from those who proceeded no further up the river than to *Pershore*, or any place above that; but, short of *Evesham*, there was no lock or sluice within the parish of *Bengworth*, and when the tonnage dues were paid at *Evesham*, the boatman took back with him a certificate from the appellant of his having paid the dues at *Evesham*, in order to enable him to repass the sluice through which he came up loaded, which was situate at *Pershore*, and which was kept locked. The same amount of tonnage was due and payable by every vessel which passed *Pershore* sluice in its way to *Evesham* or *Bengworth*, whether it proceeded as high as either of those places, or unloaded and delivered at any intermediate place, which was frequently the case, and which distance included eight different parishes where goods might be landed.

Peake, in support of the order of sessions. The proprietors of this navigation have an interest in the banks and bed of the river, part of which is situate in the parish of *Bengworth*. There is property, therefore, in that parish, upon which the rate can attach. It

is

1819.

The KING *against* MILTON.

is true, that the river tonnage, in respect of goods landed at this wharf, arises out of the use of other parts of the navigation, lying in other parishes; that, however, is an objection only to the quantum of the rate. *Rex* v. *Rebowe* (*a*), and *Rex* v. *The Inhabitants of Tynemouth* (*b*), are authorities to shew that tolls are not rateable. But those cases proceed on the form of the rate. Here the rate is upon the river tonnage, *i. e.*, the produce of the river itself, which is stated to pass through and be navigable within the parish; and *Rex* v. *Cardington* (*c*), establishes the point, that property of this description is rateable. *Rex* v. *Page* (*d*) is an authority to shew, that the profits of a navigation are rateable at the place where they become due. In *Rex* v. *The Staffordshire Canal* (*e*), the defendants were rated for their basins, towing-paths, and for the tolls and duties arising therefrom due at *Lower Milton*. In *Rex* v. *Nicholson* (*f*), and *Williams* v. *Jones* (*g*), the defendants had no interest in the bed of the river, over which the respective ferries extended. In *Rex* v. *Eyre* (*h*) the rates were upon the tolls of a bridge, and not upon any rateable property locally situate within the parish, and *Rex* v. *Sir Archibald Macdonald* (*i*) shews that tolls, though not rateable per se, are so, when connected with real property, substantially situate within the parish. Here there is rateable property; viz. a part of the river situate within the parish, and, the tolls being connected with that property, become the subject of the rate.

Puller, contrà, was stopped by the Court.

(*a*) *Cowp.* 583. (*b*) 12 *East*, 46. (*c*) *Cowp.* 581.
(*d*) 4 *T. R.* 543. (*e*) 8 *T. R.* 340. (*f*) 12 *East*, 330.
(*g*) 12 *East*, 346. (*h*) 12 *East*, 416. (*i*) 12 *East*, 324.

1819.

The King against Milton.

Abbott C. J. I am of opinion, that this rate, which has been made on the river tonnage, cannot be sustained. It has been contended, that by the words "river tonnage," we may understand the profits arising only from that part of the river which lies within the parish of *Bengworth*. It seems to me, however, that we cannot so understand those words, for they are explained to us by the subsequent facts stated in the case. From these facts, it clearly appears, that the profits accrued in respect not only of the use of that part of the navigation which was within the parish of *Bengworth*, but also from the use of the other parts of the navigation, situate in the different parishes through which the goods had passed. This is, therefore, in substance, not a rate upon the profits of that part of the river only which is situated within the parish of *Bengworth*, but a rate upon the tonnage dues payable at the wharf there, in respect of the carriage of the goods through the other parishes. Unless, therefore, we are to supersede all the late cases by which it has been held, that tolls per se are not rateable, we are bound to say, that these tonnage dues are not subject to this rate. The order of sessions must, therefore, be quashed.

Bayley J. I am of the same opinion. Since the case of *The King* v. *Nicholson*, the Court have held themselves bound to see clearly, that the property rated comes within the words of the 43 *Eliz.*, by which the rate is directed to be "by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods, in the parish." Now the party here, not being an inhabitant,

1819.

The KING *against* MILTON.

bitant must be brought within some of the other words, and the only other words applicable to this case are "occupier of land." Now in *The King* v. *Tynemouth* it was decided, that the tolls of a lighthouse, situate in the parish of *Tynemouth*, but collected in the several ports at which the vessel, passing along the coast, afterwards arrived, were not rateable qua tolls in the township, and the rate was held to be bad. In *The King* v. *Nicholson* the party was rated for the tolls of a ferry; he was not an inhabitant, nor did he occupy any lands or tenements, for he was not entitled to the land on either side of the river over which the ferry extended. The Court then considered the cases of *The King* v. *Cardington*, and *The King* v. *The Aire and Calder Navigation*. (*a*) The former case does not fall within the principle laid down in *The King* v. *Nicholson*; it was a rate for the toll of a sluice, and the party was the occupier of the sluice within the parish in which the rate was imposed. The sluice being landed property, the party was properly rated for the tolls yielded by the sluice within the parish. The cases of *Rex* v. *The Aire and Calder Navigation*, and *Rex* v. *Page*, certainly do not admit of that distinction. Those decisions, however, were expressly overruled by this Court in the case to which I have alluded. In *Rex* v. *The Staffordshire Canal*, the company were rated "for their basins, towing-paths, and that part of their canal and locks lying within *Lower Mitton*, and for the tolls and duties *arising therefrom, due at Lower Mitton*;" so that it appeared on the rate itself, that though it was nominally a rate upon tolls, yet it was on such tolls as arose from rateable property

(*a*) 2 *T. R.* 660.

1819.

The King against Milton.

within the parish. In *The King* v. *Sir Archibald Macdonald*, the rate was for the *Rochdale Canal Lock Tunnel* dues or rates. Now if those dues or rates had arisen from property partly within the parish and partly without, it would have been like the present case. The only dues which the party was entitled to receive in that case were dues in respect of vessels passing through the lock, *which lock lay within the parish*; and, therefore, all the tolls and dues there arose from what may be called parish property. The rate in this case is for tonnage dues, and it would be a good rate, provided it could be shewn that the tonnage arose wholly from the use of rateable property within the parish. It is stated, however, that the canal passes through several parishes. The tolls, therefore, which are collected for goods landed at the wharf in the parish of *Bengworth*, are payable to the proprietor as a compensation for the use of the whole line of the canal through which the goods pass, and not merely for the use of that part of the canal which lies within the parish of *Bengworth*. It is a rate, therefore, upon profits arising partly within and partly without the parish; and, upon that ground, I think that the rate cannot be supported; and, if it cannot, the case of *Rex* v. *The Mayor of Bath* (a) is an authority to shew that the rate must be quashed. In that case the rate was upon certain springs and reservoirs; and the question was, Whether the springs and reservoirs were rateable property; and the Court decided that they were; but the whole of the rate having been imposed on one parish, the Court were of opinion that it ought to have been imposed on different parishes, and that the parish

(a) 14 *East*, 609.

1819.

The King against Milton.

in which the reservoir was situate ought to have been assessed for the value of that, and that the parishes through which the pipes conveying the water passed ought to have been assessed for the value of the profits arising therefrom. It seems to me, therefore, that this rate, having been imposed on property partly within and partly without the parish, is bad; and that it is not a mere objection to the quantum of the rate.

Holroyd J. It is now to be considered as an established rule, that tolls qua tolls are not rateable. I do not mean to say, however, that a rate may not be made on rateable property under the denomination of tolls, provided that property from which the tolls arise be within the parish, and the rate be confined to that property. Here the rate is upon tonnage dues. It is said that the property rated is rateable property within the parish where the tonnage dues became payable, and that, therefore, this is to be considered as a rate upon that rateable property. I think, however, that this is a rate, not only on rateable property within the parish, but on other property, which, though rateable, is rateable in another parish, and not in this. The case states, that within the parish there is a wharf, communicating with the river, where goods, to the amount assessed, are annually landed. It must be taken, therefore, that the rate was made upon *all* those tonnage dues. It is also stated, that part of the navigation lies in other parishes, in the passage through which the tonnage dues arise, as well as for the passage through the part of the river which lies within the parish. Now, if the rate on the tonnage dues be, in fact, a rate on the rateable property, that is, on the whole part of the navigation, in

1819.

The King *against* Milton.

respect of which those dues are payable, it must be considered as a rate upon the profits arising, not only from that part of the navigation which is within the parish, but from that also which is not within the parish. The objection, therefore, is not merely to the quantum, but to the rate itself, viz. that it is a rate upon property without, as well as within the parish. I think, therefore, that this rate is bad, and that the order of sessions must be quashed.

Best J. I am of the same opinion. It is now clearly established, that tolls per se are not rateable. The only mode by which the tolls of a canal become rateable is by rating the land itself, or that part of the land occupied by the canal, which is locally situate within the parish; the tolls then are the profits arising from that part of the land; and the statute of *Elizabeth* authorises the rating of such property locally situate in the parish; but it does not authorise the rating of property not situate within the parish. I think that the rate here is upon property partly within and partly without the parish, and that it is, therefore, bad; and that, being so, I think the order of sessions ought to be quashed.

Peake then applied to the Court to amend the rate according to the provisions of 41 *G.*3. *c.* 23. *s.* 1.

But the Court thought that that act was confined to the quarter sessions; and that this Court had no power given to them to amend a poor-rate. They, therefore, quashed the order of sessions, but not the rate; leaving that to be amended by the sessions.

Order of Sessions quashed.

1819.

Saturday, November 6th.

REX *against* The Inhabitants of WARMINSTER. (*a*)

The examination of a soldier, taken under the mutiny act, is to be received as evidence as to his settlement, even though he be dead, or absent from the kingdom, at the time when the appeal is tried.

UPON appeal, the quarter sessions for the county of *Wilts*, quashed an order of justices for the removal of *Diana Mitchell*, widow of *Robert Mitchell* deceased, from the parish of *Warminster*, in the county of *Wilts*, to *Topsham*, in the county of *Devon*, subject to the opinion of this Court on the following case:

The pauper was married to *R. Mitchell*, *January* 30, 1782, who was then a soldier quartered at *Warminster*. In *February*, in the same year, (whilst he still continued a soldier), he was taken before the magistrates to be examined according to the clause in the mutiny act with regard to his settlement. The respondents offered in evidence the examination of the pauper's husband under the mutiny act, which the Court rejected upon the ground, that he was dead at the time of the appeal being tried, and that the act of parliament did not apply to such a case.

Comyn, in support of the order of sessions. By the 33 *G.* 3. *c.* 9. *s.* 33. it is enacted, "that it shall be lawful for any justices of the peace, where any soldier shall be quartered, in case he has either wife or children, to cause the soldier to be summoned before them in the place where he shall be quartered, in order to make oath of the place of his last legal settlement, and the justices are required to give an attested copy of the affidavit to the party, which attested copy shall be *at*

(*a*) This case was argued at *Serjeants' Inn.*

1819.

Rex
against
Warminster.

any time admitted in evidence as to such last legal settlement before any general or quarter sessions of the peace." Now this statute, being contrary to the common law, ought to be construed strictly: the inconvenience contemplated by the legislature was the removal of the soldier from the place where he was quartered, for the purpose of his being examined respecting his settlement. The statute, therefore, does not apply to a case where that inconvenience is not likely to happen, and *Lawrence* J., in *Rex* v. *Clayton le Moors* (a), was of opinion, that if the soldier went abroad the inconvenience contemplated by the legislature was not likely to happen, and that the act of parliament did not apply to such a case, and for the same reason it cannot be applied to a case where the pauper is dead at the time of the appeal. The examination is only made evidence in those cases where the parish could have procured the attendance of the pauper.

Merewether contrà was stopped by the Court.

Abbott J. No man entertains a higher opinion of any thing which fell from Mr. J. *Lawrence* either judicially or extrajudicially, than I do. The point, however, upon which he is supposed to have given an opinion, was not the point which was argued before him, or upon which the Court pronounced judgment. His attention does not appear to have been directed to the words used by the legislature, "that the attested copy shall, *at any time*, be admitted in evidence." It has been contended that the words "at any time" do not mean at a time when the pauper was either absent from this

(a) 5 to 2

country

country or when he was dead. I cannot, however, find any thing in the act of parliament from which I can infer that it was the intention of the legislature to restrain those words to the life of the pauper, or during his residence in this country. On the contrary, it seems to me that it may have been the intention of the legislature to preserve the memorial of the evidence of the settlement of a person whose life is exposed to more than ordinary risk. I think, therefore, that we are bound to give full effect to the words of the act of parliament, and, consequently, that the examination of the pauper's husband ought to have been admitted in evidence, and that the order of sessions ought, therefore, to be quashed.

1819.

REX *against* WARMINSTER.

Order of sessions quashed.

Ex parte JOHN COWAN, Assignee of RICHMOND, a Bankrupt.

Monday, November 8th.

J. *EVANS* moved, on the first day of this term, for a rule nisi for a prohibition to the Lord *Chancellor*, sitting in bankruptcy, on the ground that he had

Upon a motion for a prohibition, to the Lord Chancellor, sitting in bankruptcy, it appeared that the assignees had seized, as the property of the bankrupt, a farm belonging to *A. B.*, and had kept it a long time, and mismanaged it, and that the Lord Chancellor had referred it to the Master to take the account between *A. B.* and the assignees, in respect of such property, and of its mismanagement, and afterwards, upon his report, had ordered a certain sum to be paid to *A. B.* by the assignees, the commission having previously been superseded: Held, first, that the jurisdiction of the Lord Chancellor, sitting in bankruptcy, was not confined to the period during which the commission subsisted; secondly, that he had not exceeded his jurisdiction, in ordering the Master to take an account as to the mismanagement, &c of the property, nor in making the assignees personally liable, beyond the funds in their hands, for such mismanagement: Held, thirdly, that the Lord Chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of the bankrupt, and over the assignees, for all acts done by them in their character of assignees, by virtue or under colour of the commission: Held, fourthly, that, in cases where the Lord Chancellor has jurisdiction generally, this Court has no authority to revise his order: Held, fifthly, that no prohibition can be granted after the final order of the Lord Chancellor, unless there be an original want of jurisdiction apparent on the face of the proceedings. Quære, Whether this Court have authority to direct a prohibition to the Lord Chancellor sitting in bankruptcy.

pro-

1819.

Ex parte COWAN.

proceeded, without any jurisdiction, to make an order for the payment of 2107*l.* 1*s.* 6*d.* by *Cowan*, on or before the first day of this term. The facts of the case and the points made in argument were so fully stated by the Court in giving their judgment, that it is unnecessary to state them. In support of the motion, the following authorities were cited: *Davy's* case (*a*), *Ex parte Rowton* (*b*), *Eyre* v. *Jackson* (*c*), *Brymer* v. *Atkins* (*d*), *Ex parte The Earl of Litchfield and Another* (*e*), and 4 *Inst. p.* 200.

Cur. adv. vult.

On this day the Judgment of the Court was delivered by—

ABBOTT C. J. A motion was made in this court on *Saturday* last, on behalf of *John Cowan*, for a rule to shew cause why a prohibition should not issue to the Lord Chancellor sitting in bankruptcy, to restrain the further proceeding upon an order made on the 14th *July* last. In support of this novel application, it was stated to us, that in *February*, 1815, a commission of bankruptcy issued against one *T. G. Richmond*, who was declared a bankrupt, and that *John Cowan*, the person now applying, and one *Heapy*, were chosen his assignees. Under this commission, possession was taken of a farm called *Collingdean*, as the supposed property of the bankrupt. *Mary Ann Hughes* claimed

(*a*) *Ld. Raym.* 531. 12 *Mod.* 331.
(*b*) 17 *Ves.* 426.
(*c*) 1 *Chan. Rep.* 229.
(*d*) 1 *Hen. Bl.* 164.
(*e*) 1 *Atk.* 88.

this

1819.

Ex parte COWAN.

this farm, and the property thereon, as belonging to herself, and presented a petition to the Vice-Chancellor in the same year, which was referred to the commissioners, who reported against her. She also brought an action against the messenger, in which she was nonsuited; and in *April*, 1816, the Vice-Chancellor dismissed her petition. Pending this, *Richmond* brought an action against the assignees to try the validity of the commission, and obtained a verdict, for want of proof of the petitioning creditor's debt. In *May*, 1816, *Mary Ann Hughes* presented a petition to the Lord Chancellor, praying for a reversal of the Vice-Chancellor's order, and for restoration of the property, &c. In *August*, 1816, an order was made to supersede the commission, and a writ of supersedeas issued in the following *November*. In *January*, 1817, the petition of *M. A. H.* was heard, and the Lord Chancellor then directed an issue to be tried in the Court of Common Pleas, upon the question of her interest in the farm, &c.; and, upon the trial of this issue, she obtained a verdict, establishing her interest. On the 12th of *December*, 1817, the Lord Chancellor made an order, that *Cowan* and *Heapy*, the assignees under the commission, and one *Wells*, an auctioneer, should account before the Master with *M. A. H.* in respect of the property taken. In *July*, 1818, *M. A. H.* died. The petition was afterwards revived by the executors of *M. A. H.* Proceedings took place before the Master, in pursuance of the order of reference; and, finally, on the 14th of *July* last, the Lord Chancellor, upon the Master's report, ordered the sum of 2107*l.* 1*s.* 6*d.* to be paid to the executors of *Mary Ann Hughes*, by *Cowan*, *Heapy*, and *Wells*, or one of them, on or before the first day of

1819.

Ex parte COWAN

of this term. It was suggested, that this sum was not merely the amount of profits or property actually received, but that the Master had allowed the estimated value of the farm, during a period that the assignees had kept the possession, and left the land uncultivated. This period must have been subsequent to the time when the original petition of *M. A. Hughes* was presented to the Vice-Chancellor. Some other proceedings were mentioned, which are not important to the point before us. Indeed, this commission, and the proceedings under and consequential to it, have engaged the attention of the Court in many different ways not material to the present question.

It was contended, that the Lord Chancellor, sitting in bankruptcy, had no jurisdiction in this case, for three special reasons; first, because the commission had been superseded before the order was made; secondly, because the sum directed to be paid was composed, in part, of something in the nature of damages, which could only be ascertained by a jury in an action at law; and, thirdly, because the order was not confined to a payment to be made out of funds in the hands of the assignees, but operated personally upon the parties by whom the payment was directed to be made. As to the first point, it is impossible to say, that the jurisdiction of the Lord Chancellor is confined to the period during which the commission subsists. The greatest injustice would result from such a conclusion, for then a person, against whom a commission had issued, which was afterwards found not to be sustainable, and whose whole property had been taken from him by colour of it, must either bring an action at law, in

1819.

Ex parte COWAN.

which he might lose half the value for want of proof, or go through the slow process of a bill in equity, for discovery and relief. A petition in bankruptcy is festinum remedium, and it contributes not less to the saving of expense than to the saving of time. The proceeding under the commission operates by way of sudden seizure of property belonging or supposed to belong to a bankrupt. A process so speedy and summary requires to be controuled by a speedy and summary course of relief. If difficult questions of law are found to be involved in a petition, the Lord Chancellor directs a bill to be filed, as well for solemn discussion, as to afford an opportunity of appeal from his own judgment. If a doubtful question of fact occurs, an issue is directed, as was done in the present case. In the present case, indeed, there is a particular reason against this objection, for the original petition was preferred before the commission was superseded.

In support of the second objection, it was contended, that the jurisdiction of the Lord Chancellor in bankruptcy cannot be greater than in his Court of Equity upon bill and answer, and that nothing in the nature of damages can be decreed in a suit; and for this the case of *Eyre* v. *Jackson*, 1 *Chanc. Rep.* 229. was cited. That was a bill of review to reverse a decree, and was not a proceeding in prohibition. By the original decree, pronounced eight years before, the then plaintiffs had been ordered to restore certain goods, &c., of which they had unlawfully possessed themselves, and further to pay the sum of 400*l.* In this suit, they sought to be relieved from the 400*l.*, and obtained a reversal of the original decree, pro tanto. The original decree appears, by the dates, to have been pronounced during

the

1819.

Ex parte COWAN.

the time of the usurpation. This case, however, appears to us to be wholly inapplicable to the present, because, in the present case, the mismanagement occurred after the presenting of the first petition, that is, pending the litigation; and if the Lord Chancellor had jurisdiction to order restitution immediately, it was a necessary incident to such jurisdiction, that he should have authority to compel the parties to make good all that the complainant had suffered during the struggle to retain the possession of her property. This remark also furnishes an answer to the third objection. It was the neglect of the assignees, that they did not take care so to manage and husband the property pendente lite, as to be able to make full restitution without loss to themselves, if restitution should be finally awarded. They should have known, that none of the proceedings which had occurred in their favour were final and conclusive upon the subject matter of this contest. Another answer, however, and one more proper, as it respects the application to this Court, is, that supposing the Lord Chancellor to have jurisdiction generally upon the subject of the petition, this Court has no authority to revise his order. If the Master's report was built upon an erroneous basis, exception should have been taken to it before the Lord Chancellor, and the merits of each particular matter should have been discussed before him. It was further contended, generally, that the Lord Chancellor had no jurisdiction in this matter. The case of the restoration of short bills, in *Ex parte Rowton*, 17 *Vesey*, 426. was referred to, and the expression there used by the Lord Chancellor, "as far as the assignees are concerned, I have a right to take order for the disposition of the effects," was quoted

to

1819.

Ex parte COWAN.

to us, as shewing that the jurisdiction was confined to the effects of the bankrupt. But, upon a reference to the case, it is manifest, that the expression must be understood, not of the effects of the bankrupt, but of effects taken under the commission. The petitioners in that case, at the time of preferring their petition, and upon the facts therein stated, were not less strangers to the commission than *M. A. Hughes* in the present case. This circumstance excited a doubt in the mind of the Lord Chancellor, in the first instance, as to his jurisdiction upon petition. But, in the result, that doubt appears to have been removed. And it is obvious, that the bills restored were not the effects of the bankrupt, for if they had been, the assignees would have been entitled to retain them. The present application has been made to this Court after the *final order* of the Lord Chancellor, which must be analogous to the final decree or judgment of a Court; and it is a settled rule, that you cannot apply for a prohibition after a judgment, unless there be an original want of jurisdiction apparent upon the face of the proceedings. It would, indeed, be most injurious to a petitioner, if the assignees should submit themselves to a jurisdiction, allow interlocutory orders to be made, an issue at law to be tried, and an account to be taken before a Master; and then, when they find the ultimate decision against them, that they should be permited to turn round and say, that the whole is coram non judice, and void, and all the labour and expence of the petitioner thrown away in a fruitless pursuit. No want of jurisdiction appears in this case. On the contrary, we think the assignees are unquestionably subject to the control and jurisdiction of the Lord Chancellor sitting in bankruptcy, for all acts done by

 them

1819.

Ex parte Cowan.

them in their character of assignees, by virtue or under colour of the commission.

We have thought it right to give our more deliberate opinion upon this point. In doing so, we wish not to be understood as giving any sanction to the supposed authority of this Court to direct a prohibition to the Lord Chancellor sitting in bankruptcy. We do not decide against such an authority, because we have not heard the question fully argued. It will be time enough to decide that question when it necessarily arises, if ever it shall do so, which is not very probable, as no such question has arisen since the institution of proceedings in bankruptcy, a period little short of 300 years. If ever the question shall arise, the Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own.

Rule refused.

Monday, November 8th.

The King *against* Rowland.

A plea to a quo warranto stated, that an immemorial court leet was in part, holden in the morning and in part in the evening, and that the custom had been to elect the mayor at the morning court, which burgess had been accustomed to be sworn into the office at the evening court, by the steward or his deputy. The replication denied the mode of election; and there was also an issue "not duly sworn." At the trial, it appeared, that, in addition to the custom set out in the plea, it had been usual for the leet jury to present, in writing, the candidate who had most votes at the morning court, to be sworn in by the steward at the evening court; but they had no control over the poll: Held, that this was a mere ministerial act, on their part, and that it was no essential part of the custom, and need not be stated on the record.

QUO warranto against the defendant, as mayor of the borough of *Holt*, in the county of *Denbigh*. The first plea, after stating an immemorial court-leet and view of frank-pledge, holden within the borough,

1819.

The KING *against* ROWLAND.

borough, set out a charter of the Earl of *Arundel* and *Surry*, of the 13 *H.* 4., confirmed by letters patent of Queen *Elizabeth*, and accepted by the inhabitants. It then set out a bye-law, that the mayor and burgesses, or such of them as chose to attend, should assemble at the court-leet, held within one month after *Michaelmas*, and should elect one of the burgesses to be mayor for the ensuing year; and that the usage since the bye-law had been conformable to it; and that the court-leet, since the bye-law, had been in part holden in the morning and in part in the evening, the one being called the morning and the other the evening court; and that the custom had been to elect the mayor at the morning court, "which said burgess hath been used and accustomed to be sworn into the office of mayor of the said borough by the steward of the said lordship or his deputy for the time being; and thereupon hath used and been accustomed to be admitted into the office of mayor of the said borough; and being elected, sworn, and admitted, hath, during all the time, held, exercised, and enjoyed the same office." It then stated, that on the 27th *October*, 1818, a court-leet was held before *C. W. W. Wynne*, Esq., the steward, in the morning, which was duly adjourned to the evening of the same day; and that defendant was duly elected at the morning, and sworn in at the evening court. The replication, after tendering issues on the different facts alleged in the plea, stated that "from the time of composing, constituting, establishing, and making the said supposed bye-law in the said first plea above-mentioned, hitherto the mode of electing a mayor of the said borough hath not been

 according

1819.

The KING *against* ROWLAND.

according to the said supposed bye-law, in manner and form as the said *John Rowland* hath above in his said plea in that behalf alleged. And this, &c. Whereupon issue is joined." And it also stated, that "the said *John Rowland* was not duly sworn into the said office of mayor in manner and form as the said *John Rowland* hath above in that plea alleged. And this &c. Whereupon issue is joined." At the trial, at the last *Shrewsbury* assizes, before *Holroyd* J., the mode of election set out in the defendant's plea was proved, with this addition, that the custom had been to swear the jury of the leet at the morning court, and then to take the poll for mayor; and that, at the evening court, the jury used to make a written presentment of the person who had the majority of votes to the steward to be sworn in. On the present occasion, the jury had presented to the steward the candidate opposed to the defendant; but the latter having the majority of legal votes, the steward swore him into the office of mayor. It did not appear that the jury had ever exercised any discretion over the poll, their office being only to present the successful candidate. *Taunton*, for the crown, contended, that there was a material variance between the statement and the proof, and that the presentment by the jury should have been stated in the plea. The learned Judge, at the trial, over-ruled the objection; but gave liberty to move to enter a verdict for the crown, if the Court should be of a different opinion. And now

W. E. Taunton moved for a rule nisi accordingly. Here the presentment should have been stated in the plea,

1819.

The King *against* Rowland.

plea, being a necessary part of the election. The defendant was bound to set out the whole mode of election, and he has not done so. For, in fact, it was not usual for a person elected as he was to be admitted mayor. *Rex* v. *Leigh* (*a*) is an authority to shew, that even though a defendant may have a good title deducible from the record, still, if he allege a prescription, and fails to prove it, judgment must be entered for the crown. Mr. Justice *Yates* there said, "The defendant must set up a complete title, and if he fails in it, or in any chain of it, judgment must be given against him." A prescription is entire, and the whole must be set out. *Lovelace* v. *Reynolds* (*b*), *Waring* v. *Griffiths* (*c*). A presentment is often of great importance; for, in the case of copyhold, a surrender without a presentment is altogether void. *Com. Dig.* tit. *Copyhold*, F. 10. *Burgoyne* v. *Spurling*, (*d*). [*Bayley* J. There it is because no surrender at all can be taken out of court except by custom: and the presentment is part of the custom.] Here the election was not perfect till there had been a presentment. At all events, the crown is entitled to judgment upon the issue "not duly sworn in manner and form as defendant hath alleged;" because, certainly, the defendant has not been sworn in the usual mode.

Abbott C. J. I think the Court ought not to grant this rule. It appears that all that was alleged in the defendant's plea was proved. But it is objected that this proof was coupled with the proof of another ma-

(*a*) 4 *Burr.* 2147. (*b*) *Cro. El.* 546.
(*c*) 1 *Burr.* 441. (*d*) *Cro. Car.* 273.

1819.

The King *against* Rowland.

terial fact, viz. the presentment; and that this fact was not alleged in the plea. Now it appears to me that this presentment was merely ministerial on the part of the jury. It was their duty to present the person having the majority of legal votes; and they had no discretion on the subject. Their written presentment was similar to an entry made in corporation-books by a town-clerk, recording, that on such a day and at such a time *A. B.* was duly elected. Such an entry as this on the day of swearing in, it may often be customary for the town-clerk to read as a matter of ceremony. But it is no material part of the appointment; and not being so, it needs not be alleged in a defendant's plea. I think, therefore, that there is no ground for disturbing this verdict.

Bayley J. concurred.

Holroyd J. If this presentment were an essential part of the custom, it would put it in the power of the jury to defeat any election. The foundation of the mode of election is the bye-law, which is wholly silent as to any presentment. And if the presentment had its origin in a subsequent bye-law, that should have been replied by the crown.

Best J. concurred.

Rule refused.

1819.

FOX, Administrator of MARY FISH, deceased, *against* FISHER and Another, Assignees of THOMAS FISH, a Bankrupt.

Monday, November 8th.

Where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate, and being so in possession, became a bankrupt, and a creditor of the intestate, afterwards took out letters of administration, and claimed the goods from the assignees: Held, that these goods were within 21 *Jac.* c. 19., being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them.

TROVER for household furniture. Plea, general issue. At the trial at the last *Summer* assizes for the county of *Dorset*, before *Graham* B. the following facts appeared: *Mary Fish* kept an inn at *Bridport*, and having died intestate in 1807, *Thomas Fish*, her son, took possession of the inn and all its furniture, &c. which he continued to carry on for his own profit till *February*, 1819, when he became bankrupt, and the defendants, as his assignees, took possession of the goods and sold them. *T. Fish* never took out letters of administration to his mother's effects. In 1806 *Mary Fish* became bound as surety in a bond for 400*l.* to Sir *Evan Nepean*, and the bond having been forfeited, the plaintiff, as agent of Sir *E. N.*, took out letters of administration to *Mary Fish*, on the 19th *May*, 1819, and claimed the property in that character. At the time of the death of *Mary Fish* in 1807, she left two sons, *Thomas* and *William*, surviving her; but *William* died on the 24th *December*, 1818, previously to the bankruptcy of *Thomas*. The learned Judge, at the trial, was of opinion that this case fell within 21 *Jac.* c. 19. as being property by the consent of the true owner, in the possession, order, and disposition of the bankrupt, and directed a nonsuit. And now

Pell Serjt. moved for a rule nisi to set aside the nonsuit, and to enter a verdict for the plaintiff for the

 amount

1819.

FOX against FISHER.

amount of the goods which had been ascertained at the trial. He contended that, in this case, there was no true owner who could give such consent as was necessary. The only person who could be considered as filling that character was the ordinary. But he has only a power to convey, and no property vests in him so as to enable him to give consent. The case of *Fairclaim, on the Demise of Allen*, v. *Little* (a) is in point; there it was held, in an action of ejectment, that twenty years undisturbed possession was not sufficient to bar the action, the party entitled to administration having only become so lately, and having taken out letters of administration within a short period previously to the commencement of the action; yet there it was contended that it was a possession for twenty years with consent of the ordinary. But the Court of Common Pleas held that not to be sufficient.

ABBOTT C. J. Here the son was entitled to take out letters of administration to his mother, and if he had so done, he would have vested in himself a complete legal right. Now, a creditor of the mother might either have brought an action against him as executor de son tort, or might have cited him before the ecclesiastical Court, to shew cause why the creditor, and not the son, should be constituted administrator. Neither of these things was done, and the son continued in possession of these goods for nearly twelve years. I think, therefore, that these goods were clearly within 21 *Jac.* c. 19., as being, with the consent of the true owner, in the possession, order, and disposition of the bankrupt. The case cited is distinguishable, because there the person in possession was not entitled to take out letters

(a) In C. P. *H.* 58 *G.* 3.

of

1819.

Fox *against* FISHER.

of administration; but here, the bankrupt was so entitled. I think the nonsuit was right.

BAYLEY J. If we were to hold that a possession of this sort could be defeated by administration subsequently taken out, we should make an end of the statute of James. The possession here would naturally induce the creditors to suppose that the goods were the bankrupt's property, and that he had, if necessary, taken out the letters of administration, as he was entitled to do. There are cases which shew that where an executor uses goods belonging to a testator as his own, those goods may be seized under an execution against the executor. Here the bankrupt had, for nearly twelve years, possession of these goods, with the consent of all who were entitled to dispute it with him, and that is enough to satisfy the words of the statute.

HOLROYD and BEST Js. concurred.

Rule refused.

HUCKVALE and Another, Assignees of ATKINS, a Bankrupt, *against* KENDAL.

Monday, November 8th.

After delivery of an amended declaration, a demand of a plea is not necessary to entitle a party to sign judgment.

ABRAHAM had obtained a rule nisi for setting aside the judgment signed in this case for irregularity with costs. It appeared that the action had been commenced in *Hilary* term, and, after some intermediate proceedings, the defendant ultimately pleaded the general issue, and gave notice of disputing the bankruptcy.

1819.

HUCKVALE *against* KENDAL.

ruptcy. On the 20th *May* plaintiffs took out a summons to amend the declaration, which, on the 22d *May*, was allowed, on payment of costs. The costs were taxed on the 24th *May*. On the 26th *May* the defendant's attorney called at the office of the plaintiffs' agent and desired that he would reply to his plea of the general issue. On the 4th *June* the amended declaration was delivered, and, on the 11th *June*, a rule to plead given: judgment was signed on the 22d *June*. There was no demand of a plea.

Casberd shewed cause, and contended that the demand of a plea was not necessary in the case of an amended declaration; because there the party is under terms to plead within a specific time, and for this he cited *Pearson* v. *Reynolds* (*a*), and *Baker* v. *Hall* (*b*). And, besides, there was no available plea in this case at all; for the general issue, which had been pleaded to a former declaration, was at an end.

Abraham, contrà. The defendant's attorney requested a reply to the general issue, after the declaration had been amended, which shewed therefore that he meant to abide by that plea to the amended declaration. Then, as to the demand of a plea, the cases cited are different from the present; for, in them, the defendant has express notice of the time allowed.

Per Curiam. The application of the defendant's attorney was previous to the delivery of the amended declaration. It is not possible, therefore, to say, that

(*a*) 4 *East*, 571. (*b*) 1 *Taunt*. 538.

there

1819.

HUCKVALE *against* KENDAL.

there was a plea in the office when the judgment was signed. And, as to the other point, there being no authority to shew that there must be a demand of a plea in such a case as the present, we do not think it right to introduce such a useless ceremony.

Rule discharged with costs.

BRITTAIN *against* The CROMFORD Canal Company.*

Tuesday, November 9th.

Where, by a canal act, a toll of 1s per ton was imposed upon all coal, &c. navigated upon any part of the canal, from a place *A.*, or from any place within two miles thereof. Held, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from *A.*, although conveyed upon a part of the canal within two miles of *A.*

TRESPASS for seizing and detaining plaintiff's barge. Plea, general issue. The justification of the defendants depended on a claim of an additional toll of one shilling per ton gross tonnage, on coal and coke navigated upon a certain part of the *Cromford* canal. The clause under which the claim was made was as follows: "For all coal and coke which shall be navigated, carried, and conveyed upon any part of the said intended canal from the place where the said canal shall cross the River *Amber*, or from any place within two miles thereof, and passing in the direction towards *Cromford*, the further sum of one shilling per ton." At the trial at the last *Derby* assizes, before *Abbott* C. J., it appeared that the plaintiff's barge, having commenced her voyage at a place more than two miles from the point mentioned in the above clause, had been navigated on a part of the *Cromford* canal, with coal and coke on board, within the specified distance, and that she was passing in the direction towards *Cromford*. The learned Judge, at the trial, thought that this did not make the plaintiff liable to pay this additional

1819.

Brittain against Cromford Canal Comp.

ditional toll. The plaintiff, therefore, had a verdict. And now

N. G. Clarke moved for a new trial, on the ground that the learned Judge was mistaken in his construction of the clause.

Abbott C. J. I thought, at the trial, that the words "navigated from," used in this clause, denoted a voyage from the place where the goods were loaded on board the barge. I think so still. That place, in the present case, was not within two miles of the point specified in the clause, and, therefore, the plaintiff was not liable for the additional toll.

Bayley J. The ground for this toll was, that great expence was incurred by the company, in making this particular part of the canal. And, as persons who travelled only a short distance on the canal, would pay only a small toll, the legislature provided, that if that short distance was in this particular spot, they should pay an additional toll. That reason, however, does not apply to persons who come from a distance, and whose ordinary payments, therefore, are more considerable. I think, therefore, that the legislature, in using this mode of expression, must have contemplated a voyage commencing within the specified limits. Our construction may, perhaps, be inconvenient in cases where that voyage commences just beyond the limits, but we cannot make a new toll.

Holroyd

1819.

BRITTAIN *against* CROMFORD Canal Comp.

HOLROYD J. The words of a clause of this sort ought to be perfectly clear, before we impose a fresh tax on that part of the public using this canal.

BEST J. concurred.

Rule refused.

MOUNTSTEPHEN and Others *against* BROOKE and Others.

Tuesday, November 9th.

Where, in a deed between defendants and a third person, defendants acknowledged, within six years, the existence of a debt, and the plaintiffs were wholly strangers to the deed · Held, this was sufficient to take the case out of the statute of limitations.

ASSUMPSIT by plaintiffs, as indorsees, against the defendants, as acceptors of four bills of exchange drawn by one *Mills*. Plea, statute of limitations. The bills were drawn in 1807 and 1808. In order to take the case out of the statute, the plaintiffs put in a deed between *Mills* and the defendants, dated *June* 20, 1812, in which *Mills* and a person of the name of *Shiles* covenanted that they would indemnify the defendants against the payment of these individual bills, which were recited in the deed to be then outstanding and unpaid. The action was commenced within six years after the execution of this deed by the defendants. *Abbott* C. J. who tried the cause, thought that this was sufficient to take the case out of the statute of limitations, and the plaintiff, accordingly, obtained a verdict. And now

Gurney moved to enter a nonsuit. The question, in this case, is, whether this can be taken out of the statute of limitations, by a deed to which the plaintiffs were no parties, and with which they had nothing to do.

There

1819.

MOUNTSTEPHEN *against* BROOKE.

There was, therefore, nothing from whence a promise to the plaintiffs to pay the debt could be implied.

ABBOTT C. J. The statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidence of such payment. Here, however, there is no such thing, for there is a solemn acknowledgment of the existence of the debt within six years, the legal effect of which is, to raise, of itself, a a promise to pay the debt.

Rule refused.

Tuesday, November 9th.

MARRIAGE *against* LAWRENCE.

An entry in the public books of a corporation, is not evidence for them, unless it be an entry of a public nature.

TRESPASS for taking three sacks of wheat. Pleas, the general issue and several justifications, in which the defendant justified as water-bailiff of the borough of *Malden*, in the county of *Essex*, and the question was, as to the right of the corporation of that place to certain tolls. At the trial before *Garrow* B., at the last assizes for the county of *Essex*, the defendant, in support of his case, offered in evidence an entry from the books of the corporation, dated 18th year of *Hen.* 8., entitled, " Malden. Curia Electionis officiariorum ibidem tenta die Veneris primo post festum Epiphaniæ domini anno R. Henrici 8." 13mo. The entry was to the following effect: It stated, that two ships, loaded with coal, had, on the 17th *June* preceding, arrived within the liberties of the borough; and that the master had, without any licence from the bailiffs of the borough, and without paying any

any fine, delivered certain chaldrons of the coal, and, after having been warned of this infringement of the rights of the borough, had proceeded to finish the delivery of their cargo; upon which the bailiff and council of the borough assembled in the *Motehall*, on the 23d *June*, and after consulting the charter of the corporation, resolved to seize the ships. The ships having been seized, their masters, *William Blocksman* and *John Styngatt*, afterwards came and admitted their offence, and submitted themselves to the bailiffs. It then stated a fine of 40*s*. imposed by the bailiffs, of which 36*s*. was remitted, and 4*s*. paid. The entry was signed *P. Goldbourne*, clericus burgi prædicti. The books in which this entry was found were the public books of the corporation, and contained the records, &c. of their sessions, which, by the charter of the borough, they were entitled to hold. The learned Judge rejected the evidence, and the plaintiff obtained a verdict.

Taddy Serjt. now moved for a new trial, upon the ground of the rejection of this evidence. The books were of a public nature, and were, therefore, receivable in evidence. It may be admitted, that a corporation is, as to its private rights, in the same situation as any individual. But this entry is a record of a public transaction, in which a fine has been imposed for a breach of duty; and it is found in the corporation books, in which all their public transactions are recorded, and where the account of what takes place at their sessions is to be found. Books of this sort were considered as evidence in *The Mayor of Hull* v. *Horner*

1819.

Marriage *against* Lawrence.

Horner (*a*); and in *Viner's Abridgment*, vol. 12. p. 90. placitum 16. it is held, that the common books of a corporation are evidence, in regard they contain a register of their public transactions; and for this, the case of *Thetford* is cited, and *Rex* v. *Mothersell* (*b*) is to the same effect.

Abbott C. J. It seems to me that this evidence was rightly rejected. This was no more than a minute made by a party in his own memorandum-book, and it was, in fact, making evidence for himself. It is said these were public books in which this entry was found; but they were not public books for all purposes. If this entry had been of a public nature, it would have been different; but this not being so, the rules of evidence require that it should not be received.

Bayley J. This falls within the rule of evidence, which prohibits a party from making evidence for himself. If a corporation enter their own private business in the public court-book, that circumstance will not alter the nature of the entry; for if the entry apply to private transactions alone, it will still fall within the rule applicable to private books, which cannot be given in evidence for the party to whom they belong.

Holroyd J. The book in which the entry is made can make no difference, for it will not make the entry of a public nature because it is found in a public book; and if it be of a private nature, it is not receivable in evidence.

Best J. concurred.

Rule refused.

(*a*) *Cowp.* 102. (*b*) 1 *Str.* 93.

PROCTOR *against* MANWARING.

Tuesday, November 9th.

The statute 55 G. 3. c. 137. s. 6. only prohibits churchwardens or overseers from supplying the workhouse, or the poor of the parish generally; and therefore, where an overseer, receiving an order for the relief of *J. S.*, an individual pauper, paid *J. S.* part in money, and, by the consent of *J. S.*, gave her the remainder in goods from his shop: Held, that he was not liable to the penalty of 100*l.* imposed by the act.

DEBT for penalties under 55 *G.* 3. *c.* 137. *s.* 6. The first count of the declaration stated, that the defendant was duly appointed overseer for the borough of *Leominster*, in the county of *Hereford*; and that, during the time he retained such appointment as aforesaid, he did, in his own name, provide, furnish, and supply, for his own profit, certain goods for the support and maintenance of the poor of the said borough. The other counts varied the statement of defendant's liability. Plea, general issue. At the trial at the last assizes for the county of *Hereford*, before *Richardson* J., there were several charges made against the defendant, which received an answer in fact. But there was one wholly uncontradicted in evidence. *Anne Williams*, a pauper of the borough, was in the habit of receiving 8*s.* 6*d.* per week relief; and it was proved that the defendant, who kept a chandler's shop, paid her allowance on several occasions, partly with goods from his shop, and partly in money. The learned Judge told the jury, that, in his opinion, the act was intended to prohibit overseers from supplying the parish generally; or perhaps it might include a case where a pauper had been constrained to take a part in goods, but he left it to them to say, whether or not this had been consented to voluntarily by the pauper; telling them, that, if that were so, he was of opinion, that it was clearly not within the act of parliament. The jury were of opinion, that the pauper had voluntarily consented to take part in goods

1819.

PROCTOR *against* MANWARING.

and part in money, and found a verdict for the defendant. And now

Peake moved for a new trial, on the ground of a misdirection of the learned Judge; and he contended, that the act amounted to a total prohibition of all dealings with paupers, by the overseers. The influence which such persons necessarily possess, is such as will compel paupers to submit to impositions: and a half voluntary consent will be given, which it was the object of this act to prevent. The words of the sixth section are not merely that overseers shall not furnish goods to the workhouses for their own profit, but also are, "or otherwise, for the support and maintenance of the poor," which seem to include every possible case. The voluntary consent of the pauper was therefore immaterial, and ought not to have been left to the jury.

ABBOTT C. J. This being a penal clause in this act of parliament, must not be extended by construction, and though there may be cases suggested, falling within the mischief intended to be prevented by the legislature, yet, if they have not used proper words, so as to include them within the prohibition, it is not competent for the Court to extend the act of parliament to them by construction. Now the words are, "That no churchwarden or overseer shall, under the pain of forfeiting 100*l*., either in his own name or in the name of any other person, provide, furnish, or supply, for his own profit, any goods for the use of any workhouse, or otherwise, for the support and maintenance of the poor in any parish, &c. for which he shall be appointed overseer, during the time of his appointment; nor be concerned,

1819.

PROCTOR *against* MAINWARING.

cerned, directly, or indirectly, in furnishing or supplying the same, or in any contract relating thereto." Now it appears from the expression "for the use of any workhouse," and afterwards from that of "the support of the poor," that the poor generally, and not individuals of that class, are intended to be included within those words. An overseer, therefore, cannot contract for the workhouse, nor can he, if there should be an inclement season, during which it might be considered desirable to furnish a general supply of coals or blankets to the poor, be the person to furnish such articles to the parish. The exception seems to me to fortify this view of the case, by which two justices are authorized, in case no person can be found within a convenient distance competent to undertake the supply of such articles for such workhouse for *the use of the poor there*, by certificate, to permit an overseer to contract and agree for such supply. So that it seems to have been the intention of the legislature, only to prohibit overseers from being contractors for the general supply of the poor; and the word "there" distinctly shews, that this part of the clause is applicable only to the poor who are in the workhouse. This, therefore, narrows the construction of the previous part of the clause. I think, therefore, that the case which was proved, does not fall within the act of parliament. It would have been very easy for the legislature, had they so intended it, to have said, that it should not be lawful for an overseer to deliver to any pauper articles in lieu of money ordered for relief, but they have not so expressed themselves. I am, therefore, of opinion, that there should be no rule granted in this case.

1819.

PROCTOR *against* MANWARING.

BAYLEY J. I am of the same opinion. The object of the act was, to prevent imposition upon the parish by the overseers. If, therefore, goods are required for the parish workhouse, or if any other general supply for the poor is wanted, the overseer is not to furnish that supply; but it seems to me, these are the only cases contemplated by the act. Where a pauper carries an order for relief to the overseer, he has a right to demand it in money; and, in case of refusal, has a speedy remedy, by complaint to the justice who made the order. If the conduct of the overseer in selling the articles be oppressive, the justice may punish him for it; but, if the overseer be absolutely prohibited from selling, it might be an hardship upon the pauper. For there being no words distinguishing the case of money laid out by the pauper, after full payment by the overseer, from that of a payment partly in goods and partly in money, a pauper might be compelled, in case the overseer kept the only shop in the village where the articles were supplied, to go to a very inconvenient distance, for the purpose of purchasing them from some one else.

HOLROYD J. However desirable it may perhaps be to prevent the mischief attending such cases as the present, yet we cannot extend a penal statute so as to bring this case within it. The words of the statute appear to me applicable only to a general supply of the poor by the parish officers. This case, therefore, does not fall within the act.

BEST J. concurred.

Rule refused.

DOE, on the demise of HOWSON, *against* WATERTON.

Wednesday, November 10th.

A conveyance of copyhold lands to charitable uses, in the life-time of the party, is within 9 *G.* 2. *c.* 36., and therefore must be made with the formalities required by that act. The Court will not, even after a long and undisturbed enjoyment, presume a bargain, and sale, and enrolment of the same in Chancery: Quære, If it would be sufficient, in the case of copyhold, to declare the uses by a deed, conformably to 9 *G.* 2. *c.* 36., and to cause such deed to be enrolled in Chancery.

EJECTMENT. The case was tried at the last *Summer* assizes for the county of *York* before *Wood* B. The following facts appeared: *Robert Yoward*, being seised of the premises, which were copyhold of the manor of *Rothwell*, surrendered them by writing dated 19th *July*, 1743, into the hands of the lord of the manor, "To the use of certain persons therein named, their heirs and assigns for ever; in trust, nevertheless, to and for the use, benefit, and habitation of the poor of the town of *Rothwell* for ever." The trustees were duly admitted at a Court holden *October* 12, 1743. The lessor of the plaintiff was the eldest son of the last surviving trustee, who died in 1786, and he was duly admitted tenant upon the inquisition of the homage upon the like trusts upon 20th *October*, 1813. No evidence was given to shew when *Robert Yoward* died. At the trial, *Hullock* Serjt., for the defendants, objected that this surrender was void by the statute of 9 *G.* 2. *c.* 36., none of its provisions having been complied with, and he cited *Arnold* v. *Chapman* (*a*), to shew that copyhold lands were within that act. The learned Judge, being of the same opinion, directed a nonsuit. And now

Tindal moved for a new trial. He contended, that though a devise of copyhold was held to be within the

(*a*) 1 *Ves. Sen.* 108.

1819.

Doe *against* Waterton.

statute 9 *G.* 2. c. 36. in the case of *Arnold* v. *Chapman*; yet, in this case, the gift is not by will, but by conveyance in the life-time of the party, and a conveyance of copyhold is not within the statute. The statute directs that such conveyances shall be made by deed indented, sealed, and delivered twelve months before the death of the party, and enrolled in Chancery within six months of its execution. But a copyhold estate cannot pass by bargain and sale, enrolled, and, therefore, it follows, that it was not included within the act. And it is not within the mischief intended to be remedied. For a copyhold does not pass by a private conveyance, but by surrender, which is a public act, done openly in the lord's court. But, secondly, the statute does not make void the legal estate, and therefore, as the plaintiff has been admitted, he may recover at law, *Doe, dem. Toone,* v. *Copestake.* (*b*) Supposing, however, that a bargain and sale and an enrolment are necessary, they may, after so long an enjoyment, be presumed to have existed; *Mayor of Kingston* v. *Horner* (*c*), *Rex* v. *Long Buckby.* (*d*) And, as to the objection, that it did not appear that the surrenderor, in this case, survived for a year after the surrender, it is sufficient to say, that, as it appears he was alive when the surrender took place, the Court will also presume that he continued alive for a twelvemonth afterwards.

Abbott C. J. The case of *Arnold* v. *Chapman*, which has been cited, is a distinct authority to shew, that copyhold, as well as freehold lands, are within the operation of the 9 *G.* 2. c. 36. And if it were perfectly

(*a*) 6 *East*, 331. (*b*) *Cowp.* 102. (*d*) 7 *East*, 45.

clear,

1819.

DOE against WATERTON.

clear, that it was impossible, for the mode of conveyance pointed out by the statute to be adopted, in the case of copyhold, the only consequence that would follow would be, that the statute would absolutely prohibit any conveyance of copyhold to charitable uses. But it would, by no means, be a legitimate consequence, that copyhold lands could lawfully be conveyed without the formalities required by that act. The act was passed for the sake of public policy and to prevent persons from conveying their lands to charitable uses in a secret manner at or near to the time of their death. It therefore directs the execution in the presence of two witnesses, and the enrolment in Chancery, and makes it necessary that the party should survive for a year. It is said, that in this case, the Court may presume, if necessary, that a bargain and sale, and enrolment have been made. But the cases cited are very distinguishable from this, and no instance can be found, where the Court have presumed that an enrolment has been made. I am, therefore, of opinion, that no such presumption ought to be made, and, that there are no sufficient grounds for granting this rule.

BAYLEY J. I am of the same opinion. The statute meant to provide that a party who conveyed his lands to charitable uses, should, at the time of such conveyance, be of full understanding, and that the conveyance should possess the greatest possible notoriety. It is said, that by a surrender of copyhold openly in the lord's court, this will be effected. But that is not so; for, though the surrender, itself, be notorious, yet the uses to which the lands are surrendered, need not appear on the rolls of the Court. Admitting that there

1819.

DOE *against* WATERTON.

could not be an operative bargain and sale in this case, still the parties might, at least, have attained the object of notoriety, by executing a deed declaring the uses of the surrender, in the mode required by the statute, and having it enrolled in Chancery; but that has not been done in this case. As to presuming an enrolment, if it had appeared, that the rolls of Chancery had been searched, and a chasm had been discovered about the period of this surrender, it might have been different. At present, there is no evidence, upon which such presumption can be founded.

HOLROYD J. It appears to me, that copyhold lands are within the mischief intended to be remedied by the statute 9 *G.* 2. *c.* 36.; and, if so, they fall within the rule of law, which says, that cases within the mischief of a statute shall be held to be included in the general words of it. And, although a copyhold must pass by surrender, and not by bargain and sale, yet, it is clear that the uses of the surrender may be declared by deed indented and enrolled. That, however, has not been done in this case.

BEST J. concurred.

Rule refused.

1819.

BADGER *against* FORD.

Thursday, November 11th.

A copyhold tenement, to which a right of common was annexed, having vested in the lord by forfeiture, he re-granted it as a copyhold, with the appurtenances: Held, that having always continued demisable, while in the hands of the lord, it was a customary tenement, and, as such, was still entitled to right of common: Held, secondly, that a custom for the lord to grant leases of the waste of the manor, without restriction, is bad in point of law.

DECLARATION stated, that plaintiff was lawfully possessed of a messuage or tenement, and sixteen acres of land, with the appurtenances, situate in the parish of *Dagenham*, in the county of *Essex*, and, by reason thereof, was entitled to have common for all his commonable cattle, levant and couchant, upon his messuage and land, on a common called *Bentry Heath*, situate in the parish aforesaid, every year, at all times of the year, as to the messuage and lands, with the appurtenances belonging; yet, that the defendant, well knowing, &c. built upon the said common, and inclosed the same, &c. &c. Plea, not guilty. At the trial before *Garrow* B., at the last assizes for the county of *Essex*, it appeared that the messuage and land, in respect of which the right of common was claimed, had, about fifty years ago, vested in the lord by forfeiture, and that he re-granted the same as a copyhold, with its appurtenances, to have and to hold, according to the custom of the manor. It also appeared, that for upwards of 150 years, the lord had been in the habit of granting leases of parcels of the waste of the manor, under which inclosures were made; and that, under similar leases, the whole of the common in question was inclosed in the year 1810. There was no other waste upon the manor upon which the commoners could depasture their cattle, at all times of the year, although they turned their cattle on the king's forest during all but the fence months. It was

con-

1819.

BADGER *against* FORD.

contended at the trial, first, that the tenement in respect of which the action was brought, having vested in the lord by forfeiture, the right of common became extinguished, and the re-grant of it as a copyhold tenement, cum pertinentiis, did not recreate the right of common; and, secondly, that the circumstance of the lord having, at all times, granted leases of parcel of the waste, raised an implication that such a power was reserved to him at the time of the original grant. The learned Judge directed the jury to find a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit upon both these points. And now,

Marryat moved accordingly; and he contended, first, that the copyhold, to which the right of common was annexed, having itself become extinguished, in consequence of the customary estate having vested in the lord by forfeiture, the right of common was also destroyed; and he cited *Massam* v. *Hunter*. (*a*) There, a copyhold to which a right of common was annexed, being enfranchised by the lord, had become extinguished, and the lord granted it in fee, cum pertinentiis; and it was there held, that this gave no right of common, for the common was gained by custom, and annexed to the customary estate, and was therefore lost with it: common, of its own nature, not being incident to a copyhold estate, but a collateral incident gained by usage. Secondly, admitting the plaintiff to have a sufficient estate to entitle him to maintain this action, still, the usage which has existed for 150 years for the lord to grant parcels of the waste,

(*a*) *Yelv.* 189.

is

1819.

BADGER *against* FORD.

is sufficient to raise a presumption that the lord reserved the power to himself at the time of the original grant.

ABBOTT C. J. When a copyhold tenement is seized into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements, demised or demisable by copy of court-roll: and while the estate remains in the lord, it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by copy of court-roll. In this case, if the lord had brought an action against the plaintiff for turning on his cattle, there can be no doubt that he might have pleaded that this was a customary tenement, demisable by copy of court-roll; and that, by custom of the manor, all such tenements had a right of common. As to the second point, I think it is too much to suppose a reservation of a power by the lord, at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether. Such a custom cannot exist. I am, therefore, of opinion that there should be no new trial.

Rule refused.

1819

Friday, November 12th.

Roe, on demise of Heale and Others, Assignees of Dingle, a Bankrupt, *against* Rashleigh.

A deed contained a power of attorney to *A. B.* to deliver seisin of the premises, according to the form and effect of the deed: Held, that it was not necessary for the attorney to make livery on the day of the date of the deed, but that his power was well executed afterwards.

EJECTMENT for premises in *Cornwall*. At the trial at the last assizes for that county before *Best* J. it appeared, that the defendant, by a deed, dated 29th *September*, 1790, had granted the premises in question to *Joseph Dingle*, to hold from the date thereof for his life. The lease contained a power of attorney to deliver seisin as follows: " *C. R.* doth, by these presents, make, constitute, and appoint *K. B.* and *W. T.*, his lawful attorney and attornies, jointly and severally for him the said *C. R.*, in his name, into the said premises, or any part thereof, in the name of the whole, to enter into full and peaceable possession and seisin thereof, for him the said *C. R.*, and in his name to take and have, and after such entry, possession, and seisin thereof had and taken, the like full and peaceable possession and seisin thereof, or of some part thereof, in the name of the whole, up to the said *Joseph Dingle*, to give and deliver, according to the form and effect of these presents." On the lease there was indorsed a memorandum of livery of seisin having been made by *W. T.*, one of the above attornies, to *Joseph Dingle*, on the 11th *January*, 1791. It was objected at the trial, that under these circumstances, the lease was not good, inasmuch as livery of seisin could not be made by attorney on a day subsequent to the date of the lease, unless the attorney was specially authorized so to do; and *Hennings* v. *Pauchard*

v. *Pauchard* (*a*) was cited. *Best* J. directed a verdict for the plaintiff; but reserved the point. And now

Adam moved to enter a nonsuit. A power of this sort must be strictly pursued, being only a bare authority, not coupled with an interest. Now the power was to give livery of seisin, according to the form and effect of the lease, which must mean livery of seisin, on the 29th *September*, the day of the date. The case of *Hennings* v. *Pauchard* is precisely in point. There the date of the lease was the 10th *June*, the livery of seisin the 23d *July*, and, being by attorney, the lease was held void. In *Tiler's* (*b*) case, where the lease was for life, to commence at *Michaelmas*, and the lessor made livery after *Michaelmas*, it was held to be a good lease. So if he makes letter of attorney to give livery after *Michaelmas*; but if he makes letter of attorney to make livery generally, and the attorney makes livery after *Michaelmas*, that is a disseisin to the lessor; so that there it appears that the Court takes a distinction between livery of seisin by the lessor and by his attorney. The former may make livery at any time, but the latter only according to the special authority given to him. It is said, that the case in *Cro. Jac.* has been overruled by *Freeman* v. *West* (*c*); but, in that case, this point seems to have been taken for granted, and *The Dean and Chapter of Worcester's* (*d*) case, upon which Lord Chief Justice *Pratt* relies, does not seem to warrant such a conclusion; for there it was a lease for life, to commence a die datûs, and the letter of attorney was to make livery the next day, which was

(*a*) *Cro. Jac.* 153.
(*b*) 2 *Roll. Rep.* 366.
(*c*) 2 *Wils.* 167.
(*d*) *Palmer*, 30.

the

1819.

Roe *against* Rashleigh.

the day of the commencement of the lease, according to the then prevailing decisions. Besides, in *Doe* v. *Watton* (*a*) the case in *Wilson* was stated to be a mistake. He also cited *Butler* v. *Fincher* (*b*); *Vin. Abr.* tit. *Feoffment*, U., and 1 *Rolle, Abr.* 828. *Buckler* v. *Hardy.* (*c*)

Abbott C. J. If this objection were to prevail, it must have the effect of avoiding very many leases, particularly ecclesiastical leases, in which livery of seisin has been made by attorney. But, notwithstanding that mischievous consequences would follow from our decision, if I entertained any doubt upon the subject, I should be disposed to grant this rule, for the purpose of having the point discussed. As that, however, would naturally excite great doubt and alarm, in many persons whose interests would be affected by it, and as I do not entertain any doubt on the subject, I do not think we ought to grant the present application. Had the case in *Croke* not been overruled by any subsequent authority, I should, although I do not understand the principles upon which it was determined, have yielded to it so far as to have granted this application, for the purpose of having the question decided in a more solemn manner. But that has been already overruled, after two arguments, in the case of *Freeman* v. *West*, upon reasons which appear to me to be quite satisfactory. The Court there held, that a power to deliver seisin, according to the true meaning of the lease, did not confine the attorney to make livery of seisin on the particular day of the date of the deed,

(*a*) *Cowp.* 191. (*b*) 2 *Bulst.* 302. (*c*) *Cro. El.* 585.

but

1819.

ROE *against* RASHLEIGH.

but extended to his doing so at some convenient opportunity afterwards. I think, therefore, that the livery of seisin was properly made in this case, and that we ought to refuse this rule.

BAYLEY J. I am of the same opinion. *Freeman* v. *West* is a direct authority in point, and the reason of the thing is in favour of that decision. It is said, that that case is broken in upon by the authority of *Doe* v. *Watton*. But that is not so, for the mistake alluded to there, applies not to the case but to the supposed opinion of *Wilmot* J. stated at the end of the case by the reporter, and which is corrected by *Ashurst* J. in *Doe* v. *Watton*.

HOLROYD J. The case of *Freeman* v. *West* seems to me to have been rightly determined, and I think it ought to govern our present decision. It has been argued in the present case, that the power was to deliver seisin according to the tenor and effect of the deed; and it is contended, that the livery of seisin in this case was not according to the tenor and effect of the deed, because no freehold was conveyed by it till a subsequent period; but that objection was considered in *Freeman* v. *West*, where the words of the power were similar to the present, and yet the Court there would not narrow the construction. The true meaning of such a power is, that the attorney shall deliver seisin at any convenient day subsequent, and that the lessee shall hold according to the tenor and effect of the lease; and there *Pratt* C. J. said, that it would make no difference where the livery is made by the lessor himself, or his attorney, according to the tenor, effect, and true meaning of the lease, six months after the date. As

1819.

Roe *against* Rashleigh.

to the case of *Hennings* v. *Pauchard*, it is difficult to say what were the true grounds on which it was decided. But, perhaps, it may be explained. That was a special verdict, and the jury found a demise on the 10th *June*, which demise implied a livery of seisin on that day, for without that, it would not be a complete demise; and if so, it would clearly be repugnant and inconsistent, in the same special verdict, afterwards, for the jury to find a livery of seisin on the 23d *July*. I think, therefore, that this verdict is right, and that we ought not to grant this rule.

Best J. At the time of the trial, no other case was cited, but that from *Cro. Jac.*; and though I did not see the principle on which that case proceeded, I yielded to its authority, and reserved the point. But if *Freeman* v. *West* had been cited, I should not have done so. It is observable, that Lord *Coke*, when he is describing what is necessary to make a good livery of seisin, does not allude, in the least, to the necessity of its being made on the day of the date of the deed if made by attorney, and that affords a presumption that it is not necessary. But the case in *Wilson* (a) is expressly in point, and the Court there, after two arguments, overruled the former decision. That case is much more consistent with reason, and ought to be adhered to. Although I cannot yet distinguish this case from *Hennings* v. *Pauchard*, yet, as that case has been properly overruled, I am of opinion that this verdict ought not to be now disturbed.

Rule refused. (b)

(a) 1 *Inst.* 52. a.

(b) See *Walter* v. *Dean and Chapter of Norwich*, *Moore*, 875. where the same point was decided.

1819.

The KING *against* RICHARD CARLILE.

Saturday, November 13th.

The statute 9 and 10 *W.* 3. *c.* 32. has not altered the common law, as to the offence of blasphemy, but only given a cumulative punishment. It is, therefore, still an offence at the common law to publish a blasphemous libel.

THE defendant had been convicted, upon an information filed against him by the Attorney-General for a blasphemous libel. The information was precisely similar to the indictment in the case of *The King* v. *Williams*, *Howell's State Trials*, vol. 26. p. 656. And being now brought up for judgment,

Denman moved in arrest of judgment. The charge in this information is of an offence at the common law; but the 9 & 10 *W.* 3. *c.* 32. must be considered as having repealed the common law in this respect. It may be laid down that where a statute prescribes a particular mode of proceeding, and affixes a particular punishment to the offence, there, unless there be an express saving of the common law, the only mode of proceeding is upon the statute. In the 5 *Eliz.* *c.* 9. there is an express saving of the common law as to perjury. And the 5 & 6 *Ed.* 6. *c.* 14. is to the same effect; for, after the passing of that act until the 12 *G.* 3. *c.* 71., by which it was repealed, it does not appear that forestalling was an offence at common law. Now the statute of 9 & 10 *W.* 3. *c.* 32. provides that persons committing the offences there specified, who shall be convicted thereof by the oath of two witnesses shall be subject to certain disabilities, and punished in a particular manner, over which the Judges have no discretion. Now if, after that statute, it remained an offence at common law, the discretion as to punish-

 ment

1819.

The King against Carlile.

ment would be still in existence, although that act had provided the contrary. Besides, certain privileges are given by the act to defendants, such as the necessity for two witnesses, and information within four days, and a power of recantation. Now of these the defendant would be deprived, if it were competent totally to disregard the statute, and to proceed at common law. It has undoubtedly been determined, that a blasphemous libel is an offence at common law. But *Taylor*'s case (*a*), where that was laid down, was decided before the statute. And, in the cases since the statute, viz. *Rex* v. *Hall* (*b*), *Rex* v. *Woolston* (*c*), *Rex* v. *Williams* (*d*), and *Rex* v. *Eaton* (*e*), it does not appear that this objection was taken and over-ruled. [*Holroyd* J. In the report of *Rex* v. *Woolston*, given more fully in *Fitzgibbon*, p. 64., you will find that the objection was taken, and expressly over-ruled.] It may be fairly doubted whether *Rex* v. *Woolston* was properly a case within the statute. And if it were not, then *Taylor*'s case was an authority to shew that the offence there charged was an offence at common law.

Abbott C. J. I consider it to be perfectly clear, that the 9 & 10 *W.* 3. *c.* 32. did not take away the common law punishment for this offence. Its title is "An Act for the more effectual suppressing of Blasphemy and Prophaneness," and the preamble recites the object to be "for the more effectual suppressing of the said detestable crimes." And, for this purpose, it imposes

(*a*) 1 *Vent.* 293. 3 *Keb.* 607. (*b*) *Strang.* 416.
(*c*) *Strang.* 834. (*d*) *How. St. Tr.* 26. 653.
(*e*) Not reported.

certain

1819.

The KING *against* CARLILE.

certain disabilities on persons convicted, which are of a very high and severe nature. But it appears to me that the legislature intended not to repeal the common law on this subject, but to introduce certain peculiar disabilities as cumulative upon the penalties previously inflicted by the common law. The very severe nature of these disabilities might well induce them to introduce provisions of the nature contained in the second and third sections of the act. Now I take it to be a general rule, that where there is a misdemeanor at common law, a statute providing a particular punishment for it does not repeal the common law; and the rule laid down by Lord *Mansfield* in *Rex* v. *Robinson* (a) is this, that where a statute creates a new offence by prohibiting and making unlawful any thing which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute; because there the sanction is cumulative, and does not exclude the common law punishment. The present case seems to me clearly to fall within the rule laid down by Lord *Mansfield*, and the distinction there laid down is, I apprehend, well-founded, and grounded, too, on

(a) *Burr.* [illegible]

 good

1819.

The King *against* Carlile.

good authority. If a statute makes that felony which was a misdemeanor at the common law, we know that the misdemeanor is merged in the felony; and it cannot be proceeded upon as a misdemeanor afterwards; but I believe many instances will be found in which prosecutions at the common law are constantly carried on against certain offences, although there are statutes enacting particular punishments for those offences, and providing that a particular course of proceeding shall be adopted, in order to bring them within their operation. I take the principle to be perfectly clear, and to have been long established; and, therefore, I am of opinion, that the argument now addressed to us ought not to prevail, and that there is no ground for arresting this judgment.

Bayley J. It is always a great satisfaction to find that the point argued before the Court has been already decided, and that seems to me to be the case upon the present occasion; for the rule laid down in *Rex* v. *Robinson* is directly in point, that where an act of parliament does not vary the class and character of an offence, but only directs that it shall be proceeded against and punished in a particular way, the punishment given by the act is cumulative. If, however, the class and character of an offence be varied; as, for instance, if from a misdemeanor it be made a felony, the case is widely different. Here *Taylor's* case decided that blasphemy was a misdemeanor at common law, and the statute does not make it more than a misdemeanor. The punishment, therefore, given by the act is cumulative on the punishment at common law. Besides, it appears from the report of *Rex* v.

Woolston,

1819.

The King against Carlile

Woolston, in *Fitzgibbon*, that this very point was there taken and over-ruled. I think, therefore, that there is no ground for the present motion.

Holroyd J. I am of the same opinion; and, even if the objection had not been made and over-ruled in *Rex* v. *Woolston*, I should have had no doubt about it. In the case of *Rex* v. *Lopez*, which was before the Court a few days ago, the indictment was for bribery, and it was laid to be an offence at common law. But no such objection as the present was there taken.

Best J. It has long been a settled maxim, that neither the provisions of the common or statute law are abrogated but by the express words of an act of parliament, or by subsequent enactments, so inconsistent with the previous law as to raise a necessary implication that the legislature intended it should be altered. To bring into doubt what Judges and learned writers have treated as indisputable, we are referred to 5 *Eliz.* *c.* 9., and 5 & 6 *Ed.* 6. *c.* 14. The first of these statutes is supposed to contain a clause for continuing the common law proceedings against perjury. The 13th section, which has been alluded to, will be found to have no reference to the common law, or any proceedings upon it, but to a power then vested in the Chancellor and certain other great officers, which the statute calls an absolute power to punish perjury. But this clause was introduced to prevent those Judges, who exercised an unfettered discretion, from inflicting a less punishment than that which this statute denounced. As to the 5 & 6 *Ed.* 6. *c.* 14., neither that act nor any

 of

1819.

The KING *against* CARLILE.

of the other acts which were made during the reign of *Ed.* 6. against regrating and forestalling, were ever considered as abrogating the common law misdemeanor. All the writers on the criminal law considered regrating and forestalling as offences at common law, whilst the statutes were in force, and since the repeal of these laws by 12 *G.* 3. *c.* 71., many persons have been convicted of these offences; although it appears, from the repealing statute, that the legislature rather intended to stop all prosecutions than to revive the proceeding at the common law. So far from the statute of *William* containing provisions so inconsistent with the common law, as to operate as a repeal by implication, as far as it applies to the offence of libel, it seems intended to aid the common law. It is called "An Act for the more effectual Suppression of Blasphemy and Prophaneness." It would ill deserve that name if it abrogated the common law, inasmuch as, for the first offence, it only operates against those who are in possession of offices, or in expectation of them. The rest of the world might with impunity blaspheme God, and prophane the ordinances and institutions of religion, if the common law punishment is put an end to. But the legislature, in passing this act, had not the punishment of blasphemy so much in view as the protecting the government of the country, by preventing infidels from getting into places of trust. In the age of toleration in which that statute passed, neither churchmen or sectarians wished to protect in their infidelity those who disbelieved the Holy Scriptures. On the contrary, all agreed, that as the system of morals which regulated their conduct was built on these Scriptures, none were to be trusted with offices who shewed they

were

1819.

The KING *against* CARLILE.

were under no religious responsibility. This act is not confined to those who libel religion, but extends to those who, in the most private intercourse by advised conversation, admit that they disbelieve the Scriptures. Both the common law and this statute are necessary; the first to guard the morals of the people; the second for the immediate protection of the government.

Rule refused.

The defendant was afterwards, for this, and for another blasphemous libel, sentenced to pay a fine of 1500*l.*; to be imprisoned for three years, and to find sureties for his good behaviour for the term of his life.

The KING *against* MARY CARLILE.

Saturday, November 13th.

It is not lawful to publish even a correct account of the proceedings in a court of justice, if such account contain matter of a scandalous, blasphemous, or indecent nature.

GURNEY, on the first day of this term, obtained a rule nisi against the defendant, who was the wife of the defendant in the former case, for publishing a libel, entitled "The Mock Trial of Mr. *Carlile*." It however, contained a true and correct account of what took place at the trial at *Guildhall*. In the course of that trial the defendant had read over, to the jury, the whole of *Paine's* Age of Reason, which was the book, for the publication of which he was indicted; and he accompanied it by arguments and statements of a most blasphemous and indecent description, the whole of which, together with the book, were republished by the present defendant, as a part of the trial. And the defendant

1819.

The King *against* Carlile.

fendant now shewed cause, in person, upon the ground that it was lawful to publish a correct statement of what actually took place in a court of justice.

Gurney and *G. W. Marriott*, in support of the rule, were stopped by the Court.

Abbott C. J. There can be no doubt in the mind of the Court, or of any person acquainted with the law of the country, that if, in the course of a trial, it becomes necessary, for the purposes of justice, that matters of a defamatory nature, should be publicly read, it does not, therefore, follow, that it is competent to any person, under the pretence of publishing that trial, to re-utter that defamatory matter. In the case of *Rex* v. *Creevey* (*a*), the defendant, a member of parliament, had made a speech in parliament, which contained matter of a defamatory nature on some individual, and he afterwards thought fit to publish that speech in a newspaper. Now, his privilege, as a member of parliament, authorised him to deliver that speech in the house of parliament; but it did not authorise him to publish even a correct account of that speech in a newspaper, and the judgment of the Court followed upon that publication. The law, I take to be most perfectly clear, and, therefore, this rule must be made absolute.

Bayley J. I remember perfectly well the case of *Rex* v. *Creevey*, and I remember perfectly that the case of *Curry* v. *Walter* (*b*), which has been referred to, was then under the consideration of this Court, and Lord *Ellen-*

(*a*) 1 *M. & S.* 273. (*b*) 1 *Bos. & Pul.* 525.

borough.

1819.

The KING *against* CARLILE.

borough, in very strong and expressive words, stated, that that case must be taken with considerable qualifications, and that, whenever it should distinctly come under consideration, he should intimate what his opinion upon that decision was. And the opinion delivered by me then, was to the same effect, and was one which I have entertained for a very long series of years. We are bound, for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider this subject was in the case of some trials for adultery. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a court of justice, to hear it, other persons are not at liberty, afterwards, to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce. I am satisfied, that whenever that point has been under the consideration of this Court, it has always been viewed, and must, invariably, be viewed in the same way. With respect to what has been said, as to the going on to publish this account, it is right that it should be known, not only that the party who originally prints, but that every person who utters, who sells, who gives, or who lends a copy of an offensive publication to any other person will be liable to be prosecuted as a publisher, and it will be no excuse for him, that it was a faithful representation of that which

a Court

1819.

The KING *against* CARLILE.

a Court of Justice, in the discharge of its duty, is bound to hear.

HOLROYD J. The case of *Rex* v. *Creevey* was not the first case in which it was determined that it is libellous to publish, in a newspaper, a correct report of a speech made in parliament. It had been determined before, in the case of Lord *Abingdon* (*a*), who made a speech in parliament, reflecting on the character of his solicitor, and then published it in a newspaper; and an information was granted against him for that offence. He insisted on his right to publish it, but the Court gave their opinion that, although he had a right to express that in parliament, he had no right to publish it out of parliament and to circulate it, as it contained scandalous reflections on an individual.

BEST J. In deciding in this case, it is not necessary to touch the case of *Curry* v. *Walter*, because that case went on this principle, that it was a fair report of that which passed. It is impossible to look at the title of this publication, and say this is a fair or a proper report of the proceedings of the trial of this party. It begins by calling itself the mock trial of that person. No man can be so absurd as to suppose that he brings himself within the protection of any case which has decided that it is lawful to publish the proceedings of a Court of Justice, who, in the very first line of his publication, libels the Court in which that verdict has been pronounced. But, I think it right, on this occasion, to

(*a*) 1 *Esp. N. P. C.* 226.

express

express my opinion of the case of *Curry* v. *Walter*; I think it is certainly lawful to publish the proceedings of Courts of Justice, but, when I say that, it must be taken with this qualification, that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people: for, if it contains that which is calculated to produce any of those effects, instead of disseminating useful knowledge, it will produce great mischief. When I say, therefore, that the proceedings in Courts of Justice may be published, I do not give my sanction to the authority of that case of *Curry* v. *Walter*, without imposing these conditions. I hope, considering the case and considering the situation of this party, it will be enough, that the law of the land is known upon this subject, and that any further sale of these publications will be stopped; and, if that be the case, I have no doubt, considering in whose hands this prosecution is placed, that vindictive measures will not be had recourse to.

Rule absolute.

The KING *against* The Inhabitants of CROFT.

Monday, November 15th.

The statutes of 8 and 9 *W.* 3. c. 11., and 13 and 14 *Car.* 2. c. 12. s. 1. are in pari materiâ, and must receive a similar construction; and therefore, where a pauper, in additio[n to his] house and land, had "agisted" three cows in the fields of his landlord for two or t[hree] months, but no positive contract for such agistment was proved: It was held, that the [ses]sions might properly infer that this was "taking a lease of a tenement," within the 9 [an]d 10 *W.* 3. c. 11., so as to discharge a certificate, although the value of the agistmen[t], *if computed only for the time of the actual occupation*, was not sufficient, if added to the ho[use] and land, to make up the value of 10*l.*

TWO justices removed, by their order, *William Hackett* and his family, from the parish of *Croft* to the parish of *Stoney Stanton*, both in the county of *Leicester*.

1819.

The King *against* The Inhabitants of Croft.

Leicester. The sessions, on appeal, discharged the order, and stated the following case:

The pauper was born in the appellant's parish, but was afterwards bound apprentice to, and served *Edward Stephens*, in *Croft*, for several years. The respondents, in answer to this, produced a certificate from *Earl Shilton*, acknowledging the father of *Edward Stephens*, *Elizabeth*, his wife, and *Francis*, their child, to belong to that parish. The appellants then proved, that the father of *Stephens*, after he came to *Croft*, under the certificate, occupied a house and homestead in *Croft*, and, at the same time, some land in *Marston*, and that in one year, while he was in the occupation of the said premises, he agisted three cows for two or three months in the fields of his landlord. No positive contract for the agistment was proved. The Court determined that the three cows were agisted for above forty days in the year, and that the average value of the agistment, reckoned by the year, added to the value of the other tenements, made the whole above ten pounds per annum; but, if the value of the agistment, taken only for the time that the cows were on the land, were to be added, it would make the whole less than ten pounds.

Reader, in support of the order of sessions. The two statutes of 9 & 10 *W.* 3. *c.* 11., and 13 & 14 *Car.* 2. *c.* 12. *s.* 1., being in pari materiâ, ought to receive a similar construction; and it has often been decided on the latter statute, that a tenement taken for less than one year, if of the yearly value of 10*l.*, will confer a settlement. *Rex* v. *Shenston.* (*a*) *Rex* v.

(*a*) *Burr. S. C.* 171.

Stoke

1819.

The KING *against* The Inhabitants of CROFT.

Stoke. (*a*) *Rex* v. *Hollington.* (*b*) *Rex* v. *Stoke-upon-Trent*(*c*), and *Rex* v. *Darley Abbey* (*d*). As to the circumstance of the word lease being mentioned in 9 & 10 *W.* 3. *c.* 11., that is immaterial. The statute did not mean to create a new settlement, but to restrain the mode of discharging a certificate to two of the old species of settlements; and it is no where said, that the occupation must be for a year. The lease must be "of the value" of ten pounds. Now that must mean "yearly value," for otherwise, as there are nine intervals of forty days in each year, the tenement, to confer a settlement, would be of the annual value of 90*l.*, which would be an absurd consequence. But, if necessary, it may, on the evidence stated in this case, be presumed, that there was a lease. For the sessions have found in fact, by their decision, a contract for the agistment; and all that is meant by the part of the case stating that no positive contract was proved, is, that no evidence directly proving it was offered. But there was evidence from whence such contract may be inferred, and the sessions, by their decision, have shewn that they did draw such an inference.

Denman, *G. W. Marriott*, and *Dwarris*, contrà. In this case an express contract should be shewn. For the words are not "come to settle on a tenement;" but "bonâ fide take a lease of a tenement;" and any positive contract is negatived by the sessions. The objects of the two statutes were very different, the one being to prevent removals only, the other to remove

(*a*) 2 *T.R.* 451. (*b*) 3 *E.* 113.
(*c*) 10 *E.* 496. (*d*) 14 *E.* 230.

the

1819.

The King against The Inhabitants of Croft.

the disability of conferring or obtaining settlements, under which certificate-men were placed: and, therefore, it was natural, that greater strictness should be used in the latter case. Here the cattle might be in the fields of the landlord, by trespass, or by indulgence on his part; and the word "agisted" alone is not sufficient for the Court to infer a contract from it: at any rate, that should have been an inference distinctly drawn by the sessions, who have not done so. If the parties had no evidence, directly proving the existence of a lease, they must fail. But that affords no reason for making an inference in their favour. Then the value is not sufficient, for the 9 and 10 *W.* 3. *c.* 11. says, that the tenement must be of the value of 10*l.* Now it is expressly stated, that for the time it was actually occupied, it was not worth 10*l.*

Abbott C. J. The question in this case, arising on the construction of the stat. 9 and 10 *W.* 3. *c.* 11., by which no person who shall come with a certificate into a parish, shall gain a settlement there, unless he shall really and bonâ fide take a lease of a tenement of the value of 10*l.*, is one of general importance. In the course of the argument, my opinion has varied on the point. The Court will, therefore, reserve its judgment on that part of the case. On the other point, however, I entertain no doubt. If the facts stated by the sessions in this case, were not sufficient for the Court to form any reasonable conclusion as to what must have been the inference of fact drawn by the sessions, we would send the case to be re-heard; but it seems to me that they are sufficient, and that the inference of fact drawn by the sessions was right. It is stated in

1819.

The KING *against* The Inhabitants of CROFT.

the case, that the pauper's father, after he came to *Croft*, under the certificate, occupied a house there, and, at the same time, some land in *Marston*; and that in one year, while he was in the occupation of the said premises, he agisted three cows, in the fields of his landlord, for two or three months. Now it seems to me, from the phrase "he agisted," that he must have done so for a compensation to be paid to the landlord. For if the fact had been that the cows only ran there, without any payment to the landlord, I think the sessions would not have used the word "agisted." If the case had stopt here, no doubt could have been entertained as to what the decision of the sessions was upon this point. They have, however, added, that "no positive contract of the agistment was proved." But I cannot understand that to mean more, than that there was no direct or express proof of the bargain between the parties, either by the production of a witness present at it, or any agreement in writing respecting it. The sessions, however, by the decision to which they have come, must have inferred a contract; and it seems to me, that from the proof given to them of the agistment of the cattle, they might lawfully have drawn that inference; and, therefore, that they did right in quashing the order. Upon the other points, the Court will take time to consider of its judgment.

BAYLEY J. I have no doubt with respect to the question which has been principally discussed in this argument. It is for the sessions to draw the inferences from the facts proved; and, if there are premises stated from which it appears that they might lawfully draw

such

1819.

The King *against* The Inhabitants of Croft.

such inferences, the Court will not disturb their decision. In this case, it appears, that the cattle ran for two or three months in the landlord's fields. Now from that the sessions might very properly infer, that the landlord was to receive a compensation for it. For it was not likely that the cattle should be there without the landlord's knowledge, and there is nothing in the case to shew that his permission was given from motives of charity. I think, therefore, that the sessions were right in inferring a contract; and, that they have drawn that inference, is manifest from the result of the appeal; for they have decided, that the pauper's settlement was in *Croft*. Now it is quite clear, unless the agistment be taken into consideration, that his settlement is not in that parish; and, therefore, as it seems to me, no doubt can be entertained that the sessions took into their consideration the value of the agistment, and must have inferred that there was a contract for it between the parties. Upon the other points, I shall, at present, give no opinion.

Holroyd J. It appears to me, from the facts stated in this case, that the sessions must have drawn an inference that there was a contract for the agistment of these cattle; and those facts were fully sufficient to warrant that conclusion. The Court, therefore, does not draw any inference itself, but only yields to that which the sessions have already drawn. I think that the term agistment does import a contract between the parties; for the cattle must have been there either by right or sufferance of the owner of the land. If this had been a question between a landlord and tenant, the circumstance of the cattle being upon the land

1819.

The KING *against* The Inhabitants of CROFT.

would not have afforded the same ground for presumption. But here it is a question between third persons; and, the agistment having been submitted to by the landlord, who might have disputed it, and who did not do so, I think we ought to presume, that the cattle were there by right, and that there was a contract between the parties.

BEST J. Upon looking at this case, it seems to me, that the question presented for our consideration, is simply, whether the sessions were at liberty to infer a contract, from the facts here stated. Now it is quite clear, that they might do so; for it is not necessary, either in this or any other case, that there should be positive proof. It is quite sufficient, if other circumstances be proved, from whence such a conclusion is necessarily to be drawn. The word "agistment" means, where cattle are in the land of another by his consent, or by some contract with the owner of the land. The proof, therefore, being that the cattle were agisted for two or three months in the fields of the landlord, the sessions might very properly draw the conclusion, that there was a contract between the parties for that purpose.

Cur. adv. vult.

ABBOTT C. J. On this day, after stating the case, proceeded as follows: This case was lately argued before us at *Serjeants' Inn Hall*. After the argument was closed, we gave our opinions upon some of the points urged at the bar, and we decided, for the reasons then given, that the sessions might, upon the facts stated, lawfully presume a contract for the depasturing of the cows, and

1819.

The KING *against* The Inhabitants of CROFT.

must be understood by us to have in fact made that presumption. But we reserved for our further consideration the question, whether, presuming such a contract, or in other words, whether presuming a taking of the pasturage for the period mentioned, this case presented, upon the whole, a taking of a lease of a tenement of the value of 10*l.*, within the meaning of the statute 8 & 9 *W.* 3. *c.* 11.? Upon the authorities, there can be no doubt that the facts here stated must be deemed to be a coming to settle upon a tenement of the yearly value of 10*l.*, within the meaning of the statute 13 & 14 *Car.* 2. *c.* 12. The only doubt was, whether a difference of construction might prevail upon the certificate act, the 8 & 9 *W.* 3. *c.* 11., which is expressed in somewhat more precise terms, viz. "bonâ fide take a lease of a tenement of the valae of 10*l.*" It is obvious however that in construing these words, reference must be had to the former statute, to supply the word "yearly," which is wanting in this statute; and, in like manner, the words of the second branch of this clause, "execute some annual office in such parish, being legally placed in such office," have been construed, with reference to the stat. 3 & 4 *W.* & *M.* *c.* 11. *s.* 6., to require a service of the office for an entire year. *Rex* v. *Inhabitants of Tittleworth*, *Burr. S. C.* 238. No case has been found in which the statute 8 & 9 *W.* 3. has received a different construction from the stat. 13 & 14 *Car.* 2., as to the nature of the tenement, or of the taking thereof. On the contrary, it has been decided, that a lease at will is a lease within the certificate act, *Str.* 502. And in the case of *The King* v. *Inhabitants of Shenston*, *Burr. S. C.* 474., Lord *Mansfield* says, the two acts are to be considered together, being in pari

materiâ.

1819.

The KING *against* The Inhabitants of CROFT.

materiâ. And in *Burn's Justice*, we find extracts from these statutes, placed together at the beginning of the section, in which that author has collected the cases "of settlement by renting a tenement," and no distinction is afterwards made. We are of opinion, therefore, that no distinction ought, in this respect, to be now introduced. This branch of the law is to be administered by different tribunals sitting in every county of *England*; and it is, therefore, of the utmost importance, that the rules of decision should be as plain and as general as the language of the statutes will admit, and that no subtle or novel distinctions should be introduced or countenanced. The rule for quashing the order of sessions must be discharged.

Order of Sessions confirmed.

CANNAN and Another *against* BRYCE.

Monday, November 15th.

Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him.

ASSUMPSIT for money had and received, &c. Plea, general issue. At the trial before *Abbott* C.J., at the *London* Sittings after last *Hilary* term, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case:

The plaintiffs are assignees of *James Amos* and *Charles Sutherland*, under a commission of bankrupt, issued against them on the 9th *February*, 1816. The defendant is a lieutenant in the service of the *East India* Company. *Amos* and *Sutherland* were merchants in partnership, trading under the firm of *James Amos* and Co. On the first of *March*, 1814, *Amos*, without the knowledge of *Sutherland*, entered into an illegal

1819.

CANNAN *against* BRYCE.

stock-jobbing transaction by which he sustained a heavy loss. It was expressly found by the jury, that the defendant *was not a partner in such stock-jobbing transaction*. *Amos* was unable to pay the loss, either with his own private funds or with those of the partnership. The defendant lent the produce of 5000*l.* 4 per cent. consols., for the purpose of paying such loss, and it was applied for that purpose. In consideration of this money so lent, *Sutherland* joined *Amos* in a bond to the defendant, which bond, by some mistake, had no condition annexed. In consequence of this it was afterwards cancelled, and another bond, in the penal sum of 7000*l.*, was executed between the same parties on the 10th *March*, 1815. The condition of this bond was, "to replace the stock on or before the 18th *Sept.* then next, and in the meantime to pay the dividends." The stock was not transferred in pursuance of the condition of this bond; and the firm of *Amos* and Co. became very much embarrassed before the 18th *September*, 1815, and *Sutherland* having committed an act of bankruptcy on the 27th *August* preceding, went to *America*, and remained there till after the bankruptcy of *Amos*. During his absence *Amos* had the sole management of the business. *Amos* afterwards executed to the defendant, at his request, three several deeds of assignment of three several cargoes; the two first of which had been shipped on account of *Sutherland* and *Amos*, and the third on account of *Amos* alone. These deeds were executed by *Amos* only. On the 17th of *January*, 1816, *Amos* committed an act of bankruptcy, and on the 9th *February* following a joint commission issued against *Amos* and *Sutherland*. In *April*, 1817, the defendant received sums of money on account of the

pro-

1819.

CANNAN *against* BRYCE.

proceeds of each of the three several cargoes mentioned in the deeds of assignment. The sums received did not, however, amount to the debt due from *Amos* and *Sutherland* to the defendant.

The case was argued by *J. Evans* for the plaintiff and *Oldnall Russell* for the defendant. For the plaintiff it was contended, that the condition of the bond was illegal, inasmuch as it was to secure the repayment of money lent for the express purpose of paying losses on illegal stock-jobbing transactions. *Faikney* v. *Reynous* (*a*), and *Petrie* v. *Hannay* (*b*), were admitted to be authorities against the plaintiff's claim; but it was contended, that those cases were over-ruled by *Booth* v. *Hodgson* (*c*), *Aubert* v. *Maze* (*d*), *Webb* v. *Brooke* (*e*), *Ex parte Mather* (*f*), *Ex parte Daniels* (*g*), *Ottley* v. *Brown* (*h*), *Lightfoot* v. *Tenant* (*i*), and *Langton* v. *Hughes* (*k*). For the defendant it was urged, that the only point upon which the authority of these cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, was doubted was, whether a party should recover who had himself been concerned in an illegal transaction. In most of the other cases cited, the payment was made by or to the party to the illegal contract; and that was the case also in *Brown* v. *Turner* (*l*), and *Mitchell* v. *Cockburne*. (*m*) Here, however, that fact was expressly negatived by the jury. The authority, too, of the cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, had been recognised

(*a*) 4 *Burr.* 2069.
(*b*) 3 *T. R.* 418.
(*c*) 6 *T. R.* 405.
(*d*) 2 *Bos. & Pul.* 371.
(*e*) 3 *Taunt.* 12.
(*f*) 3 *Ves.* 373.
(*g*) 14 *Ves*, 192.
(*h*) 1 *Ball & Beat.* 360.
(*i*) 1 *Bos. & Pul.* 551.
(*k*) 1 *M. & S.* 594.
(*l*) 7 *T. R.* 630.
(*m*) 2 *H. Bl.* 379.

N

1819.

CANNAN *against* BAYCE.

in the subsequent cases of *Farmer* v. *Russell* (*a*), *Steers* v. *Lashley* (*b*), and *Ex parte Bulmer*. (*c*) But even supposing that those cases were not valid authorities, the present case differed from them; first, because the defendant was not in any way concerned in the original transaction; secondly, because the payment was not made by him directly to the party who was to receive the difference; for the money was advanced to *Amos* and Co., and they might have employed it as they thought fit; they might even have bought an estate with it: it was similar to the case of money lent to pay a gaming debt, or to pay a bet at a horse-race, and *Barjeau* v. *Walmsley* (*d*), *Alcinbrook* v. *Hall* (*e*), were authorities to shew, that money so lent might be recovered. Another point was made, that one partner could not bind another by deed, and upon that point the Court pronounced no judgment. *Lambert*'s case (*f*), *Fox* v. *Hanbury* (*g*), *Coldwell* v. *Gregory* (*h*), and *Smith* v. *Goddard* (*i*), were cited.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was lately argued before us at *Serjeants'-Inn Hall.* On the part of the plaintiffs it was contended, that this loan being made for the purpose of enabling *Amos* to pay or compound differences upon illegal stock-jobbing transactions, was in itself illegal, and, consequently, that all securities given for repay-

(*a*) 1 *Bos.* & *Pul.* 296.
(*b*) 6 *T. R.* 61.
(*c*) 13 *Ves.* 313.
(*d*) 2 *Str.* 1249.
(*e*) 2 *Wils.* 309.
(*f*) *Godb.* 244.
(*g*) *Cowp.* 448.
(*h*) 1 *Price*, 119.
(*i*) 3 *Bos.* & *Pul.* 465.

ment

1819.

CANNAN *against* BRYCE.

ment of the loan were void, and the plaintiffs, therefore, entitled to recover the money received by the defendant in virtue of the assignments, after the acts of bankruptcy of *Sutherland* and *Amos*. On the part of the defendant it was contended, that as he was not a party to the illegal transaction, the loan was not illegal, and the securities, therefore, available in law. Another point was made upon the effect of the assignments executed, under the circumstances stated, by *Amos* alone. Upon this point it is only necessary to observe, that, admitting it to be competent to one partner, after an act of bankruptcy committed by another, to dispose of their partnership property in discharge of legal demands upon the partnership; yet it is not competent for him to do so in discharge of a demand to which the partners are not by law liable; and we think the partners were not liable in the present case, because we think the loan was illegal, and the securities void. The case was very fully and ably argued, and all the authorities bearing upon it, on one side and the other, were quoted and discussed in such a manner that it is not necessary to notice many of them with any particularity. The authorities principally in favour of the defendant are those of *Faikney* v. *Reynous and Another*, and *Petrie* v. *Hannay*. The propriety, however, of these decisions has been questioned in the several subsequent cases that were quoted on the part of the plaintiff; and the distinction taken in the former of them between malum prohit bitum and malum in se was expressly disallowed in the case of *Aubert* v. *Maze*. Indeed, we think no such distinction can be allowed in a court of law; the Court is bound, in the administration of the law, to

1819.

CANNAN *against* BRYCE.

consider every act to be unlawful, which the lawhas prohibited to be done. The statute upon which the objection to the loan in this case arises, viz. the 7 *G.* 2. *c.* 8., was founded upon public policy, to prevent, according to the language of the preamble, "the pernicious and destructive practice of stock-jobbing, whereby many of his majesty's subjects are diverted from pursuing their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce." By the 5th section, upon which this case more particularly depends, it is enacted, "That no money or other consideration shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed; but that every such contract and agreement shall be specifically performed: and all and every person, who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference-money, &c. shall forfeit the sum of 100*l.*" So that the act of paying or receiving is prohibited absolutely, and those who pay, and those who receive, are both placed in pari delicto. And this statute differs from the statute against gaming, 9 *Ann. c.* 14.; for the latter contains no prohibition against the payment of money lost at play; though it enables the loser to recover back his money within a limited time, and in default of suit by him, enables any person to recover the money and treble the value within a further limited time. Then as the statute in question has absolutely prohibited the payment of money for compounding differences; it is impossible to

say

say that the making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. And we think the present case cannot be distinguished in principle from that of the druggist who sold to a brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by an act of parliament from mixing with beer. I allude to the case of *Langton and Others* v. *Hughes and Another*, wherein it was decided, that the druggist could not recover the price of the drugs sold for that unlawful purpose. And if the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment; because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract; the bond was not less void than the contract, and if the bond was void, the assignments mentioned in the case, which were only in furtherance of the bond, and which were made by one of the partners after an act of bankruptcy committed by the other, cannot give to the defendants a right to retain the proceeds of the goods against the plaintiffs, who claim under a commission against both the partners for the benefit of the lawful creditors of both, such commission being grounded upon acts of bankruptcy committed by each of them before any of the proceeds of the goods had come to the hands of the defendant in pursuance

of

1819.

CANNAN *against* BRYCE.

of the assignments. For these reasons, we are of opinion, that the plaintiffs are entitled to recover the whole of the proceeds of the cargoes and investments mentioned in the case. And the postea must be delivered to them.

Judgment for the plaintiffs.

Monday, November 15th.

FLANAGAN *against* WATKINS.

A surety under an annuity-deed is not entitled, under 49 *G.* 3. *c.* 121. *s.* 8., to prove the value of the annuity as a *debt* under the commison; and therefore, where such a surety had redeemed the annuity, subsequently to the bankruptcy, it was held, that he was entitled to maintain an action for the value against the bankrupt, who had obtained his certificate, and that, although the grantee had proved under the 17th section.

DECLARATION in debt on an annuity-bond, to which there were several pleas and demurrers thereto. The question raised was, whether, under 49 *G.* 3. *c.* 121., the surety under an annuity-deed, who had redeemed the annuity after the bankruptcy of the grantor, might sue the grantor upon a bond of indemnity, notwithstanding the grantee had proved the value of the annuity under the commission. The facts which raised this question, appeared upon the pleadings, and were fully stated, in the judgment of the Court. It therefore became unnecessary to set out the pleadings.

Tindal, for the plaintiff. There was no debt at the time of issuing the commission. The stat. 49 *G.* 3. *c.* 121. *s.*8. applies only to those cases where the surety is in a condition to prove. Before that statute, the law stood thus: If the surety paid the debt of the principal before the bankruptcy, he might prove it, *Osborn and Another* v. *Churchman* (*a*); if he paid it afterwards, it did not constitute a proveable debt, and the bankrupt remained liable.

(*a*) *Cro. Jac.* 127.

The

1819.

FLANAGAN *against* WATKINS.

The 49 *G.* 3. *c.* 121. *s.* 8. relates to the proof of debts by sureties; the 17th section, to the proof of the value of annuities. The words of the 8th section are these: "Where, at the time of issuing the commission, any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor, as to the dividends, upon such proof; and, when the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable, to prove his demand, in respect of such payment, as a debt under the commission." This section only applies to those cases where the surety is in a condition to prove; but the surety under an annuity-deed cannot prove for the value of the annuity. Before the statute, the grantee himself could not prove, unless where it was an annuity secured by bond, and that bond had become forfeited; but now, by the 17th section, the annuity creditor may prove for the value of the annuity. The surety, however, is not enabled so to prove, and consequently his case does not fall within the act of parliament. The remedy of the surety certainly cannot depend on the voluntary act of the grantee. The case of *Welsh* v. *Welsh* (*a*) is precisely in point. There, Lord *Ellenborough* is reported to have said, "It is not a debt quoad the surety until he is in a condition to be damnified. If the legislature intended such a case as this,

(*a*) 4 *M.* & *S.* 533.

1819.

FLANAGAN *against* WATKINS.

they have not so said, nor have they used language sufficiently clear to enable us so to say."

Littledale, contrà. This statute should be liberally construed in favour of the bankrupt. The 17th section enacts, That the certificate should be a discharge against all demands, in respect of the annuity, in the same manner as such certificate would discharge the bankrupt, with respect to any other debt proved, or which might have been proved. The legislature, therefore, treats the value of an annuity as a debt. That term is not to be taken in its strictest sense; for money payable at a future day is a debt, within the meaning of the bankrupt laws: it includes any thing which is the subject of proof under the commission. The creditor swears that the bankrupt is indebted to him. Here, the creditor has proved for the value of the annuity, which is a debt, within the meaning of the 8th section; and then the surety is entitled to stand in his place. If the argument, on the part of the plaintiff, were to prevail, the debt would be paid twice: first, by the bankrupt's estate, under which the grantee has proved; and, secondly, by the bankrupt himself, upon this claim of the surety. Suppose this were the case of an annuity for a number of years certain, it would be proveable under the 7 *G.* 1. *c.* 31., as a debt payable at a future day by yearly instalments, deducting a rebate of interest. The value of that debt is the principal money, after making such deduction. The value of an annuity for life, is estimated by considering it as an annuity for that number of years which is the probable duration of the life upon which it is granted. The 17th section of the statute empowers the commissioners

to

1819.

FLANAGAN *against* WATKINS.

to estimate that value. The legislature, therefore, have adopted this principle, and have put an annuity for life on the same footing as an annuity for years, or of any debt payable at a future day; and it is clear that the surety would be entitled to prove, under the commission, for any such debt. The act, therefore, having made the value of this annuity a proveable debt, has, in effect, declared it to be a debt at the time of the issuing of the commission.

Tindal, in reply. This is not a debt. It sounds entirely in damages. It differs from the case put in argument of money payable at a future day, for that is debitum in presenti solvendum in futuro. If it be a debt, however, it clearly was not so at the time of the issuing of the commission; for it could not be a debt, until the commissioners had ascertained the value.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case, which came on upon demurrers to a very great length of pleading, was lately argued before us at *Serjeants' Inn Hall*. The question was upon the effect of the 8th and 17th sections of the statute 49 *G.* 3. *c.* 121., and the facts upon which it arose, may be thus collected from the pleadings. On the 5th *March*, 1811, the plaintiff, as surety for the defendant, joined with him in the execution of an indenture whereby the defendant granted an annuity of 300*l.* per annum, to *James Martin*, and also a warrant of attorney to confess a judgment for securing the payment of the annuity. By this indenture, the annuity was made redeemable by the defendant and plaintiff, or either of them, on payment of the sum of 2175*l.* with such ar-

rears

1819.

FLANAGAN *against* WATKINS.

rears as might happen to be due. The defendant executed a bond to the plaintiff of the same date, wherein the indenture was recited, and of which the condition was, that the defendant should keep the plaintiff harmless and indemnified from the payment of the annuity, and all loss, damages, and expenses, and from all the covenants, conditions, provisoes, declarations, and agreements, in the indenture and warrant of attorney contained, and from the payment of all sums of money to grow due thereon, or become payable in respect or by virtue thereof, and from all actions, &c. The defendant became bankrupt, and had obtained his certificate. *Martin* proved, under the commission, the arrears then due, and also proved, in virtue of the 17th section of the said statute, the value of the annuity, ascertained as therein directed, and the value so proved exceeded the sum of 2175*l*. This proof was made without communication with the plaintiff. After this proof, and after the defendant had obtained his certificate, but before a final dividend made of his effects, the plaintiff, for his own sake, redeemed the annuity according to the terms of the deed; and now brought this action upon the bond, claiming to recover from the defendant the sums paid for the redemption and arrears. The defendant pleaded his bankruptcy and certificate generally and specially.

Upon the argument no question was made as to the arrears due before the bankruptcy; they were given up, and it was admitted, that, upon the breach for those arrears, there must be judgment for the defendant. The question was upon the plaintiff's right to recover the money paid at the time of the redemption; and this question depended, as I have before observed, upon

the

1819.

FLANAGAN *against* WATKINS.

the construction and effect of the 8th and 17th sections of the statute 49 *G.* 3. *c.* 121. For the defendant, it was insisted, that the effect of the 17th section was, to make the value of an annuity, a debt within the meaning of the 8th section, in those cases, at least, where the grantee had elected to prove the value under the 17th section. We are of opinion, however, that this effect cannot, in sound construction, be given to that section. According to the terms of the 8th section, the surety, who has paid the debt, or any part thereof in discharge of the whole, may, if the creditor has proved the debt, stand in his place as to the dividends; or, if the creditor has not proved, may prove his own demand in respect of such payment as a debt. So that the right of the surety is not made to depend upon the proof of the creditor, which is a matter in his own choice, not controllable by the surety; but the surety has an independent right of his own in respect of a payment made by himself, in a case within that section, and the only word, used in that section to denote the cases within its operation, is the word "debt." We think, therefore, that no case can be brought within this section, wherein the surety may not prove, although the creditor should forbear to do so. And we think the value of an annuity is not a debt within the meaning of that word in the 8th section. The grantee of an annuity has a special power given to him by the 17th section, under the name of an annuity creditor, to prove for the value of the annuity to be ascertained by the commisioners; and the bankrupt, whether the value be proved or not, is discharged, by his certificate, against all demands in respect of the annuity in the

same

1819.

FLANAGAN *against* WATKINS.

same manner as with respect to any other debt proveable under the commission. But this clause is a special provision, applicable, in its terms, to the grantee only of the annuity, for he only is an annuity creditor, and not applicable to the surety. The value of an annuity is not, by this section or any other part of the statute, declared to be a debt to all purposes. If it had been the intention of the legislature that such value should be considered as a debt to all purposes within the operation of the bankrupt-laws, we must presume that this would have been done in direct terms, accompanied with provisions suitable to the case of the surety. This not being done, we cannot give to the statute the effect for which the defendant has contended, which, as we think, would be to make, and not to expound, the law. For these reasons, the judgment must be for the plaintiff upon all the pleas, except those which apply to the arrears which were due before the bankruptcy.

Judgment for the plaintiff.

1819.

The KING *against* TIPPETT.

Monday, November 15th.

A prescriptive right to a public towing-path, on the banks of a navigable tide-river, is not destroyed in consequence of that part of the river adjoining the towing-path having been converted by act of parliament into a floating harbour, although the towing-path was thereby subject to be used at all times of the tide; whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation: Held, secondly, that the prescription was not destroyed by a clause in the act of parliament, whereby the undertakers of the work were authorised to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for any injury he may sustain by enlarging the then towing-path, or otherwise.

INDICTMENT against the defendant for a nuisance, charging him, in the first count, with having, on 1st *April*, 1817, unlawfully obstructed a public way in the parish of *St. Augustine*, in the city and county of *Bristol*, on the side of a floating harbour there; which way had been and ought to be used by all the king's subjects going with vessels on the said floating harbour to pass and repass over for the purpose of hauling and towing their vessels along the floating harbour. The third count stated, that after the passing of an act of the 43 G. 3., entitled " An act for improving and rendering more commodious the port and harbour of *Bristol*,", and before the nuisance committed by the defendant, the *Bristol* Dock Company did, in pursuance of the act, make and convert a part of the *then* course of a navigable river, called the *Avon*, into a floating harbour, and make a new course and channel for the *Avon* in lieu of that part of the course converted into a floating harbour, and had continually, from thence, maintained the floating harbour and the new course of the river, and that from time whereof the memory of man was not to the contrary, until the obstruction thereinafter mentioned, there had been, and still ought

1819.

The King *against* Tippett.

to be a public towing-path, on the bank and edge of the old course of the old river, from the mouth of a river called the *Froome*, unto the *Lime-kiln Dock*, in the said city, until the course of the *Avon* was so changed as aforesaid, and, since that time, on the side and edge of the floating harbour used for all the king's subjects passing and repassing with their vessels, upon and along the old course of the *Avon* and the floating harbour respectively, to pass and repass along the towing-path, at all times, at their free will and pleasure, for the hauling and towing of their vessels passing along the old course of the *Avon* and the floating harbour respectively. The count then stated the obstruction as in the first count. The defendant pleaded not guilty. The indictment was tried before *Burrough* J., at the assizes for the county of *Somerset*, when the jury found the defendant guilty, subject to the opinion of this Court on the following case:

The dean and chapter of the cathedral church of *Bristol* were the proprietors of a boat-yard, part of *Cannon's Marsh*, in the parish of *St. Augustine* in that city, adjoining to water which formerly constituted a part of the river *Avon*, but which, under the 43 *G.* 3., had been converted into a floating harbour, and a new course had been cut in lieu thereof, in which new course the *Avon* now flowed. This boat-yard was demised by the dean and chapter to one *Sidenham Feast*, by whom it was underlet to the defendant, who, at the time of the obstruction, was in possession of it. The boat-yard was formerly in the occupation of one *Mansfield*, boat-builder. From time immemorial, until the passing of the acts thereinafter mentioned, there existed a towing-path, and the same was so used, after the passing of the

1819.

The King *against* Tippett.

the acts, over the boat-yard; and mooring posts had been set up and were standing for the purpose of towing and mooring vessels navigating that part of the river. The river had, till then, been a tide-river, and vessels used to be towed up and down the same every tide. By an act of the 43 G. 3., the *Bristol* Dock Company were authorised and required to make two dams and overfalls across the river *Avon* at certain places therein mentioned, with entrance-basons, locks, gates, and sluices, so as to make the space of water between such dams a floating harbour, to the constant height of sixteen feet, and to exclude the tide-water, and also to make a new channel for the *Avon*, from the place where the floating harbour commenced to a certain other place therein mentioned, and also to make a canal with a proper towing-path on the south side, from the *Avon* at or near *Avon-buildings*, in the county of *Gloucester*, to the *Avon* near the brass works in the parish of *St. George*, in the same county, and also to make a proper towing-path along the floating harbour, from such cut, and through *Temple Meads* to the west end thereof. And by the same act, after reciting that it would be of great public convenience that towing-paths should be maintained on the sides of the *Avon*, and that the greatest part of the length of such towing-paths might be formed and laid out of waste lands, the company were authorised to make towing-paths along the sides of the *Avon*, from *Chapel Pill* and *Sea Mill Dock*, to *Trim Mill* and the quays, through the lands mentioned in the schedule thereunto annexed, or in the books of reference. The schedule referred to was entitled "A schedule of lands, along which a towing-path is proposed to be made;" but none of the lands de-

1819.

The King *against* Tippett.

scribed in that schedule comprehended the spot in question. The book of reference was entitled "Book containing the names of the owners and occupiers of the property through which the navigation runs," but did not point out any lands as those through which any towing-path was to be made. By the 48 *G.* 3. it was enacted, that in case the company should make a towing-path in *Cannon's Marsh* on land belonging to the dean and chapter, then in the possession of the said *Sidenham Feast*, as their lessee, such towing-path should not exceed six yards in breadth, to be measured from high-water-mark, and to commence to or from the gate then standing at the west end of *Cannon's Marsh* aforesaid, and to extend to the corner of a yard in the occupation of *Joseph Mansfield*, boat-builder, on the east end thereof, and that the *compensation for the use of such towing-path should be ascertained in the manner therein specified*; the company were not to use the said ground, for any other purpose than as a towing-path, and the dean and chapter were not to be prevented from building, upon *Cannon's Marsh*, any docks, wharfs, &c., or from forming any cuts or canals through such intended towing-path, &c., into any such docks, &c.; in which case the Company were to make and repair the necessary draw-bridges, &c., so long as they had the use of the towing-path, In the year 1809, the several works directed by the acts of parliament were completed. That part of the river *Avon*, which lay between the places where the two dams were authorised to be made, was converted into a floating harbour, and a new course formed for the river *Avon* in lieu of the part which had been so converted. The communication at either end of the floating harbour with the new course

1819.

The KING *against* TIPPETT.

course of the river *Avon*, was kept up by means of entrance-basons and locks formed and constructed as pointed out in the acts. After the works had been completed, and the partial alterations made in the course of the river *Avon*, the towing-path and mooring-posts, mentioned in the indictment, continued to be used, until the time of the obstruction by the defendant; and after the towing-path had been obstructed, and the mooring-posts removed, five ships, by reason of such obstruction, sustained damage in passing along the floating harbour, four of them by running foul of other vessels, and one by striking against a bridge.

Casberd, for the crown. The public had a vested right in this towing-path, and that being so, such right could not be divested by statute, except by express words. *Rex* v. *Birmingham Canal Company*. (*a*) There are no express words in any of the acts stated in the case, destroying the right which the public had so acquired. The 43 *G.* 3., in its prior clauses, not only authorises, but *requires* the company to do the several works therein mentioned; and, among others, to make a proper towing-path along the floating harbour, through *Temple Meads*, to the west end thereof. In this respect the act is imperative. But *Temple Meads*, where such towing-path is required to be made, are situate on the south side, and *Cannon's Marsh* on the north side of the floating harbour. In a subsequent clause the Company are enabled merely, and not required to make towing-paths along the sides of the *Avon*, over the lands mentioned in the schedule, or in the books of reference. None of the lands described in

(*a*) 2 *B.* & *A.* 570.

1819.

The KING *against* TIPPETT.

the schedule comprehend the spot in question, and the books of reference do not specifically point out any land through which a towing-path is to be made; that act, therefore, does not apply to the present case, except as it shews that a towing-path was thought necessary for the floating harbour. Neither does the 48 *G.* 3. require the company to make any towing-path at all, but only provides, in the event of their making such towing-path in *Cannon's Marsh*, for the rights of the dean and chapter. This clause was evidently inserted for their benefit, and to prevent the company from extending the then subsisting public right to their injury. It clearly does not, in express terms, take away the public right; it only leaves it as it was before. If the company had desisted from the undertaking altogether, it could not be contended, that the public would have lost their rights. It may be said, that though the acts of parliament do not, of themselves and in express terms, destroy the right, yet considered in conjunction with the works done under them, and particularly with reference to that part of the river being destroyed, along which the towing-path in question passed, the prescription is gone. This, however, is a mere alteration of the river, and not a destruction of it; for though, in strictness, the harbour may be no part of the navigable river, still it is a part, and to *Bristol* a most important part of the navigation, and the towing-path is more essential to the navigation than it was before. In *Com. Dig.* tit. *Prescription*, G, it is laid down, that a circumstantial variation in a thing to which a prescription is annexed, does not destroy the prescription; as if a man prescribe in modo decimandi for the tythes of a park; if it be disparked, the prescription

con-

1819.

The KING *against* TIPPETT.

continues, for it is annexed to the lands; for which *Cowper* v. *Andrews* (a) is cited, and a variety of other cases to the same effect are there stated.

Bayly, contrà. The right of the public to use the towing-path has been destroyed by the several acts of parliament stated in the case, and the works done under them. By the 48 *G.* 3., the company are authorized to make a towing-path in *Cannon's Marsh*, not to exceed a certain number of feet in breadth, paying a compensation to the dean and chapter for the use of that path; that compensation is to be paid, even if the path be narrower than it was before. The legislature, therefore, considered, that the making of any towing-path would be an injury to the dean and chapter. Now that could not be an injury, if the right of the public to the old towing-path had then remained, and another was substituted of the same dimensions as the old. The public right is claimed by prescription, and, therefore, it must be exercised in the ancient mode. By the alterations that have taken place, the prescriptive right (if it exist) will be materially varied. The former right, claimed by the public, to enter the boat-yard, and to use it as a towing-path, was confined to the use of it, for the purpose of towing vessels navigating the river *Avon*. The liability of the defendant, therefore, was to have his yard crossed for the purpose of towing and mooring vessels going up and down the river, but not for any other purpose. In pleading, the prescriptive right must have been so stated; a person entering for any other purpose could not justify. The moment, therefore, the river was

(a) *Hob.* 39.

 gone,

1819.

The King *against* Tippett.

gone, there was an end of the right. The burdens imposed upon the defendant by the right were these: this was a tide-river, vessels navigated it as soon as there was water enough to float them, but they were left dry twice in the twenty-four hours; during that time, therefore, the towing-path could not be used, and the defendant was not liable to have his yard entered; the same observations applies to neap-tides. During these periods, no person had any right to enter and disturb him in the exclusive use of his premises. This was the prescriptive right while the river continued; and, subject to these burdens, and these only, the proprietor of the land might originally have consented to dedicate the towing-path to the public use; but, now that the floating harbour has been created, the occupier (if this public right still exists) is subject to have his premises entered at all times, for the purpose of towing and mooring vessels, &c. The passage cited from *Comyn's Digest* rests on the authority of the case cited from *Hobart*; in which case, as appears from *Moore* (*a*), no judgment was ever pronounced. In *Luttrel's* case (*b*), it was laid down, that a prescription to take water was not destroyed by the circumstance of changing a fulling-mill to a grist-mill, provided no prejudice thereby arise by diverting or stopping the water, as it was before. Here, however, the right, if it exist, must be varied considerably by the alterations that have taken place.

Casberd, in reply, observed that the extent to which the towing-path was formerly used, was the same as at present, though, in the one case, all the vessels would be moving at the same time: whereas, in the other they

(*a*) *Moore*, 863. (*b*) 4 *Co.* 86.

could,

could, at all times, proceed along the floating harbour, which was the principal inconvenience intended to be remedied by the acts.

1819.

The KING against TIPPETT.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. We are of opinion that the acts of parliament have not destroyed the prescription, or the right of the public to the towing-path founded thereon. It appears, that the public had enjoyed the use of the towing-path for several years after the passing of the first of these acts of parliament, and the conversion of this part of the river into a floating harbour in pursuance thereof. In the argument before us, the case was put, first, upon the general effect of this legislative alteration of the state of the river *Avon*; and, secondly, upon the effect of the particular clauses in the acts, and especially the latter act relating to the power given to the company to make a towing-path, which might extend over the place in question. Upon the first point, it was urged, on behalf of the defendant, that the effect of the alteration of the state of the river would be to cast a greater burthen upon the land in the occupation of the defendant than had previously existed; because, before the alteration, vessels could be moved only at certain times of the tide, which would include only a few hours of the natural day at any season, and a very small portion during the seasons of neap-tides; whereas, since the alteration, vessels may be moved at any hour in any season. To this it was answered, that the number of vessels to be moved up and down, in the period of a year, would not be greater since the alteration than before; because, even supposing that a greater number of

1819.

The King *against* Tippett.

of vessels should trade to the port of *Bristol*, yet such barges and vessels as were not destined for that port would, instead of passing the place in question, take their course along the new channel of the river cut under the authority of the act. Our opinion, however, is not founded upon any calculation of this nature. The purpose for which the path was used continues the same. The public had a right to use the path before the alteration, at all times and seasons when it could be practically used. The right was not limited or restrained by any ordinance of man, and had, in truth, no limit but such as was imposed by the course of nature, which imposes some limit upon the exercise of every human power. If, before the alteration, any person had been sued for using this path, he might very safely have alleged in his defence, that it was a common and public path, used by all the king's subjects for the towing of their vessels every year, at all times of the year: the exception arising out of the natural reflux of the tide need not have been noticed. An allegation that a person has a right to do any thing, at all times, at his free will and pleasure, necessarily embodies in itself a tacit exception of those times at which the doing of the thing is rendered impracticable by natural events, whether ordinary or extraordinary. A justification of passing over the land of another, under a public right of way, need not contain an exception of those times at which the way may be rendered impassable by an extraordinary flood, or by that want of artificial improvement under which many of the highways of the kingdom were formerly impassable by carriages, during some portion of the year. The improvements of modern times have rendered many roads passable at all seasons, which for-

formerly were not so, and have deprived the owner of the soil of some growth of herbage that he formerly enjoyed. This latter deprivation has, in some instances, been occasioned by the erection of houses along the sides of the way, in as short a space of time as that which was occupied in converting the tide-harbour of *Bristol* into a floating-harbour. This floating-harbour still is, in effect, part of the river *Avon*, though greatly improved, and better adapted to navigation. The use made of the place in question is of the same kind now as heretofore, and the public right is of the same kind as formerly; and we cannot say that the right is lost by those measures, which have expanded its exercise over a greater number of hours than the natural state of the river formerly allowed. The right of the public at large, under the prescription or custom, is a matter perfectly distinct from the rights or powers of the new corporation created by the legislature.

The clause enabling this corporation to make a towing-path over land, including the place in question, on payment of a compensation, is by no means inconsistent with a pre-existing right in the public to use the place as a towing-path. Its proper effect is only to give to the owner of the soil a compensation for the injury that he may sustain in consequence of any improvement made by the corporation, whether by extending the width of the path or otherwise. The public are not to lose the right formerly enjoyed, such as it was, because certain persons are furnished with an authority to render its exercise more easy and beneficial, which authority they may or may not execute, according to their own pleasure. For these reasons, we think the verdict of guilty must stand.

Judgment for the Crown.

1819.

Tuesday, November 16th.

RUSTON *against* HATFIELD.

The sheriff, in *Michaelmas* term last, returned to a writ of fi fa. "goods in hand, for want of buyers, value unknown," and no further steps were taken by the plaintiff till *Trinity* term following. In the interim, the goods were seized under an extent by the crown: Held, that the Court would not compel the sheriff to make good the loss to the plaintiff, and that they would quash a writ of distringas which had been issued for that purpose, although the plaintiff had given all the indulgence with the advice, desire, and concurrence of the sheriff's officer.

BOLLAND, in last *Trinity* term, obtained a rule nisi for quashing the writ of distringas, issued in this case on the 29th *June* last, against the late sheriffs of *London*. It appeared from the affidavits in support of the rule, that, on the 5th of *August*, 1818, a fi. fa. was delivered to a person of the name of *Philpot*, one of the officers of the sheriff of *London*, indorsed to levy 68*l*. 6*s*. 8*d*. The defendant's goods, to more than that amount, were on that day taken in execution; but the sheriff's officer did not proceed to a sale, because the plaintiff's attorney directed him not to do so. On the 6th of *November*, the sheriffs were ruled to return the writ, and a return was accordingly filed on the 23d of *November*, stating, that there were "goods in hand for want of buyers, value unknown." On that same day, the plaintiff's attorney informed the sheriffs' officer, that he had received 33*l*. 8*s*. in part discharge of the levy; and, on the 7th of *December*, 1818, he wrote to say, that he expected the rest, and desired the officer to withhold further proceedings. On the 5th of *February*, all the defendant's goods were seized under a writ of extent. The affidavits in answer stated various applications to the sheriffs' officer to pay over the money levied by him: these were continually repeated till *Nov*. 6th, 1818; and they further stated, that all the indulgence was given by the advice, desire, and concurrence of the sheriffs' officer, who, constantly, assured the plaintiff's attorney, that he might do so

safely,

1819.

RUSTON against HATFIELD.

safely, and that he would save the plaintiff harmless from any risk. It further appeared, that after the extent had swept away the goods of the defendant, the partner of the sheriffs' officer had promised to pay to the plaintiff the balance lost by their delay. The writ of distringas issued the 29th of *June*, 1819, and was directed to the late sheriffs of *London*, for the sale of the defendant's effects, seized by them, and was indorsed to levy 34*l.* 18*s.* 9*d.* The late sheriffs went out of office on the 28th of *September* last.

Abraham shewed cause. It appears in this case, that, although time has been given to the sheriffs, yet that it was done at the instance of their own officer, who must be considered as identified with them; and that distinguishes this case from *Rex* v. *The Sheriff of Surry* (a), and *Rex* v. *The Sheriff of Surry* (b), and *Rex* v. *The Sheriff of London* (c); for there, in the two former cases, it does not appear that there was any negociation to account for the delay; and, in the latter case, there was a negociation, to which the sheriff was no party. But here he is a party to it.

Bolland, contrà, contended, that in this case no reliance ought to be placed on the act of the sheriff's officer, and that it was here sworn that the plaintiff's attorney, having received part of the money, directed the officer, by letter of the 17th *December*, 1818, to withhold any further proceeding.

(a) 7 *T. R.* 452. (b) 9 *East*, 467. (c) 1 *Taunt.* 111.

Per

1819.

RUSTON *against* HATFIELD.

Per Curiam. It is not to be allowed by a negociation of this sort, between the plaintiff's attorney and the sheriff's officer, to get rid of the objection which arises out of the delay permitted by the plaintiff, and to fix the sheriff with the payment of this debt. It is sworn, indeed, that the time was given at the request of the sheriff's officer; but then that was upon his telling the plaintiff's attorney that he had then fixed the sheriff with the payment of the debt. The plaintiff, therefore, cannot, after this laches on his part, now proceed against the sheriff.

Rule absolute, but without costs.

Tuesday, November 16th.

YEMS *against* SMITH.

The memorial of an annuity, granted since 53 *G.* 3. *c.* 141., need not state that the annuity is redeemable, nor the name of the party in whose favour the warrant of attorney is given.

CHITTY had obtained a rule nisi for setting aside the annuity, and the judgment entered up under the warrant of attorney given to secure the annuity. It appeared that the annuity in question, which had been granted subsequently to the 53 *G.* 3. *c.* 141., was secured by a deed, which, amongst other things, stated, that the defendant was to be at liberty to redeem it upon certain terms therein specified. The objections were, 1st, that the memorial of the deed had omitted to state this clause for redemption of the annuity; and, 2dly, that in the memorial of the warrant of attorney the name of the party to whom such warrant of attorney was given and granted was also omitted.

Marryat and *Storks* shewed cause. They referred to the schedule given in the 53 *G.* 3. *c.* 141. *s.* 2., in which there

there is a description of the mode in which an annuity-deed must be memorialized; and contended, that it no where appeared necessary to insert a clause of the deed stating whether the annuity was or was not redeemable; and, besides, there is now no reason for so doing. Whilst 17 *G.* 3. *c.* 26. was in force there were no means by which the grantor of an annuity could ascertain the different clauses of the deed, except by examining it at the enrolment-office; but now, by 53 *G.* 3. *c.* 141. *s.* 5., he may obtain a copy of it. And as to the 2d objection, the schedule does not require the name of the party at whose suit the judgment under the warrant of attorney is to be entered up to be specified therein.

Chitty, contrà, contended, that the clause of redemption must be considered as part of the consideration for which the annuity was granted; the 53 *G* 3. *c.* 141. *s.* 2. contains precisely the same words as the corresponding clause in 17 *G.* 3. *c.* 26., and the schedule was only intended to give an outline of the memorial. Now under 17 *G.* 3. *c.* 26. it would clearly have been necessary to have stated the clause for redemption. Upon the 2d point, he contended, that the schedule required the names of the parties to be set out, and here the name of the party in whose favour the warrant of attorney was given is not set out.

ABBOTT C. J. There is no column in the schedule which requires it to be stated whether the annuity was redeemable or not; and, as to the objection that the clause for redemption is part of the consideration, it is only necessary to read the schedule, the seventh column of

1819.

YEMS' *against* SMITH.

of which has these words: "Consideration, and how paid." It is obvious, therefore, that the consideration there spoken of is a consideration which can be *paid.* The clause for redemption cannot, therefore, come within the schedule; and if any thing not specified in the schedule be necessary, the schedule itself would be worse than useless. The first objection, therefore, fails; and, as to the second, the schedule states the mode of memorializing the warrant of attorney to be thus: *A. B.* to *I. K.* and *L. M.*, attornies, &c. It does not, therefore, require the name of the party in whose favour the warrant of attorney is given to be specified.

Rule discharged, with costs.

Friday, November 19th.

BRILL *against* NEELE.

A count, stating that defendant was indebted to plaintiff for work and labour, and, being indebted, that he undertook and promised to pay, &c., whereby an action hath accrued, &c., is not a good count in debt, and cannot be joined in a declaration with counts in debt.

THE record stated, that the plaintiff had brought his bill against defendant, being in custody of the marshal, in a plea of debt, and the commencement of the declaration was in the common form in debt. The first count then stated, that defendant was indebted to the plaintiff for work and labour, &c.; and, being indebted, that defendant undertook and promised to pay upon request, whereby an action hath accrued, &c. The second count was upon a quantum meruit, and, in form, like the first. The other counts were properly framed in debt. To this declaration there was a demurrer, assigning for cause the misjoinder of debt, and assumpsit; and now the Court suggested that the declaration was in-

1819.

BRILL against NEELE.

informal, and recommended plaintiff to amend. *Tindal*, in support of the declaration, contended, that although the first two counts were informal, still, that they were not absolutely bad; for the recital of the writ shewed it to be an action of debt, and the promise might be rejected as surplusage. But, even without rejecting any thing, the word promise did not absolutely shew the count not to be in debt; for debt will lie on a concessit solvere, and the word promise is equivalent to the word agree, and it will also lie on a promissory note, *Bishop* v. *Young*. (a) The form of the declaration in that case is, that defendant promised to pay, by reason whereof, &c.; and, if debt may be maintained upon an actual existing promise, there is no reason why it should not be maintained upon a promise implied by law.

Espinasse, in support of the demurrer, relied upon *Dalton* v. *Smith* (b), where this Court held a declaration containing counts precisely similar to be bad; and *Lawrence* J. there said, that the counts laid with a promise were counts in assumpsit without a breach. The Court upon this intimated their opinion, that that case was precisely in point; and *Tindal* then craved leave to amend, stating that he was not aware of the decision cited, as the case was not reported in *East*; and leave was given, on payment of costs.

(a) 2 *Bos. & Pul.* 78. (b) 2 *Smith, Rep.* 618.

1819.

Friday, November 19th.

BAILDON *against* PITTER.

An act of parliament created a court of requests in a city and its liberties, and gave it jurisdiction over debt not exceeding 10*l.*, due from any person residing within the city and liberties to all persons residing within or without those limits: Held, that the Court had jurisdiction over causes of action arising without the jurisdiction, provided the defendant lived within it.

A RULE nisi had been obtained in the last term to exempt the defendant from costs on the payment of 8*l.* pursuant to the act of the 45 *G.* 3. *c.* 67., establishing a court of requests in the city of *Bath*, and for restraining the plaintiff from taking out execution on an affidavit that the defendant resided in the city of *Bath*. The defendant's affidavits stated the following facts: The debt was due on a promissory note made in *London* for 10*l.*, of which 2*l.* had been paid; the plaintiff had, for several years, resided in *London*; he commenced his action in *January*, and obtained a verdict at the sittings after last *Trinity* term. The witnesses examined at the trial resided in *London*, and it was sworn that no part of the cause of action accrued within the city of *Bath*. The question arose upon the above statute, and the following clauses were referred to. In page 10. the commissioners are authorised to decide all disputes and differences between party and party for any sum not exceeding 10*l.* in all actions or causes of debt, whether such debt shall arise from any bond, &c. or any promissory note or inland bill of exchange, &c. &c.; and then, in page 12., it is enacted, "That it shall be lawful for any persons, whether they reside within the jurisdiction of the said Court or not, having any debts not exceeding the value of 10*l.*, by or from any persons whatever *inhabiting, residing, or being within the said city*, or the liberty and precincts thereof, to proceed by summons in the said courts;" and then, by

1819.

BAILDON *against* PITTER.

by a clause in page 27., it was enacted "That if any action for any debt recoverable in the said court of requests should be commenced in any other court, the plaintiff shall not by reason of a verdict for him be entitled to any costs."

Chitty now shewed cause, and contended that as the cause of action arose in *London*, and the witnesses resided there, the object of the legislature, which was to save expense to the parties, would be better answered by the trial of the cause there; and he cited *Rex* v. *Danser* (*a*) to shew that, generally speaking, inferior courts of this description had not authority over causes of action arising without the local limits of their jurisdiction. Besides, here the local court had no power to compel the attendance of witnesses resident in *London*.

Reader, contrà, observed that this court derived its authority entirely from the act of parliament; by the special provisions of which act, the party himself was entitled to give evidence, and that there was nothing in the act to restrain the jurisdiction of the Court to causes of action arising within the city of *Bath*, provided the defendant resided there.

ABBOTT C. J. The Court must give effect to the plain language of the act of parliament. The words of the act are too large to admit of any doubt. It puts the jurisdiction of the Court entirely upon the place of residence of the defendant. The act, in page 10., expressly gives the commissioners authority to try causes

(*a*) 6 *T. R.* 242.

 on

1819.

BAILDON *against* PITTER.

on promissory notes for sums not exceeding 10*l.*; and in page 12. it directs that *any person, having a debt not exceeding* 10*l. in amount, from any person residing within the jurisdiction, may proceed by summons.* It is impossible, without narrowing the words of the act, not to say, that, by the proper and ordinary construction of it, this plaintiff might have sued in the court of requests. Then comes the other clause, by which it is provided, that where the commissioners are enabled to determine the case, a party who proceeds in any other court is not entitled to costs. I think, therefore, that this rule ought to be made absolute

BAYLEY J. If this were a Court existing by common law, and having only a limited jurisdiction, and the legislature had passed this act to facilitate the process of the Court, the language used might, perhaps, in that case, not be sufficient to extend that well known jurisdiction to causes not cognizable by it before. This Court, however, is created by the act of parliament which puts the jurisdiction, as to debts not exceeding 10*l.*, entirely upon the place of residence of the defendant. And that distinguishes this from *Rex* v. *Danser*, where the act was merely to facilitate the proceeding in a court baron, which, at common law, has only jurisdiction over causes of action arising within its local limits.

HOLROYD and BEST Js. concurred.

Rule absolute.

1819.

BARNARD and Another, Executors, *against* HIGDON.

Friday, November 19th

Plaintiffs sued, as executors, for the balance of an account due to the testator; and, it appearing at the trial that the balance claimed arose out of matters of account between the plaintiffs in their own right, as surviving partners of the testator, they were nonsuited. Held, that the Court had no power to order the defendant to have his costs allowed him as costs in the cause.

A RULE nisi had been obtained in the last term, to allow the defendant his costs in this action, on an affidavit stating the following facts. The declaration was for money lent and advanced by the testator, money had and received for the use of the testator, and interest thereon. The plaintiffs, in their particulars of demand alleged the money to be due to them in right of their testator. The cause was tried at the *Lincoln* Spring assizes, when it appeared, upon the books of account produced on the part of the plaintiff, that the transactions, upon which the balance claimed arose, were matters of account between the plaintiffs in their own right (as partners with the testator), and the plaintiffs were nonsuited. These accounts commenced in 1805, and continued to 1814, when separate commissions issued against the plaintiffs and their then partners, and the defendant then adjusted his accounts with the assignees. The action was brought in the names of the plaintiffs, by an order of the Lord Chancellor, made in a cause to which the plaintiffs were no parties. The plaintiff's attorney on the record, as well as the party in the chancery suit, were informed of the real nature of the transactions before the commencement of the action. The Court now stopped *Reader*, who was about to shew cause, and called upon

Denman, in support of the rule. A party is not to be exempted from costs, merely because he describes himself as executor when he has no right so to do;

1819.

BARNARD *against* HIGDON.

here the plaintiffs have sued in that character for the very purpose of defrauding the defendant of his costs. *Bollard* v. *Spencer* (*a*), *Grimstead* v. *Shirley* (*b*), and *Comber* v. *Hardcastle* (*c*), are authorities in point. In the last case the Court of C. P. made an order upon a plaintiff to pay costs who had sued in the character of administrator, upon an agreement which had, at his own request, been cancelled by the defendant.

ABBOTT C. J. At common law neither party was entitled to costs. They are given by particular statutes, and the stat. 23 *H.* 8. *c.* 15., which gives costs to a defendant in such an action as the present, speaks only of contracts made *with*, or wrongs done *to* the plaintiff. Now as this action is not founded on a contract made with the plaintiffs but with the testator, it follows that the defendant is not entitled to costs under that act; and, as costs are not expressly given to a defendant against an executor, if we were to direct the officer to tax the costs for the defendant, and those costs were made part of the judgment, that judgment would be erroneous. I am, therefore, clearly of opinion, that this rule, in the terms in which it is drawn up, cannot be made absolute; and I would by no means encourage the defendant, under the special circumstances of this case, to apply to the Court for an order upon the plaintiff to pay costs, as was done in the case of *Comber* v. *Hardcastle*. It is sufficient, however, at present to say, that we have no power to order these costs to be taxed, and to become part of the judgment; and, therefore, this rule must be discharged.

Rule discharged.

(*a*) 7 *T. R.* 358. (*b*) 2 *Taunt.* 116. (*c*) 3 *Bos. & Pul.* 115.

1819

The KING *against* GEORGE WILLIAMS, Esq.

Saturday, November 20th.

The sessions have no jurisdiction, under 55 G. 3. c. 51. s 16., to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and, therefore, where a county-treasurer, in obedience to such an order, made the payment, and that payment was afterwards, by an order of sessions, allowed in his accounts, the Court of K. B. quashed so much of the order of sessions as allowed that item: Quære, whether, under the 55 G. 3. c. 51. s. 16., the sessions have a power to make any compensation to the clerk of the peace.

AT the annual general sessions of the peace for the county of *Lancaster*, holden at *Preston*, on the 25th *June*, 1818, the Court of quarter sessions allowed the treasurer's accounts, on the debtor side of which was the following item: "To the clerk of the peace — his fees on rolls issued in *April*, *July*, and *October*, 1817, and in *January*, 1818, 35,589*l.* 17*s.* 0*d.*, at 1*s.* per pound, 148*l.* 5*s.* 8*d.*" The order of sessions having been removed into this court by certiorari, *Parke* obtained a rule nisi for quashing so much of it as related to the above item, on an affidavit, stating, that such allowance had been made, not upon an estimate of the labour of the clerk of the peace, but on a calculation of poundage on the sums estreated by the rolls issued. In answer to this, the affidavits stated an order of sessions, dated 4th *December*, 1815, which was as follows: "That the clerk of the peace be allowed one penny in the pound on all sums raised by virtue of the said new assessment, in lieu of his usual fees heretofore taken for making the rates and for the rolls, exclusive of all charges and expences in printing and preparing the said rolls, which he is hereby directed to charge in his annual accounts."

Scarlett and *I. Williams* shewed cause. The county treasurer was bound to obey the order of sessions of *December*, 1815, and he was, therefore, justified in making the payment in question. And if any objection is to be taken to that order, it ought to have been

1819.

The KING against WILLIAMS.

removed by certiorari, and so brought before the Court. If the court of sessions had jurisdiction to make any order for a compensation to the clerk of the peace, it is sufficient; for they have exercised that jurisdiction; and as the order itself is not before the Court, the mode in which the jurisdiction has been exercised is not in question. Now the 55 *G.* 3. *c.* 51. gave a jurisdiction in cases like this to the magistrates; for the 16th section enabled them to make compensation to all their officers, and their jurisdiction was not denied in *Rex* v. *Houldgrave* (*a*): but there the order was before the Court, and it appeared that the justices had made a vicious computation. Here it is not before the Court; and the Court will not presume that an order not before them is bad. Every presumption should be made in favour of an order of this description. Here the work had been performed at the time of the allowance of the treasurer's accounts, and the Court may fairly presume that the sessions then estimated its value, and finding that an allowance of one penny per pound on the sum estreated was a proper compensation for the labour done, allowed that sum accordingly. They also cited *Rex* v. *Inhabitants of Essex.* (*b*)

Parke, contrà. The 55 *G.* 3. *c.* 51. *s.* 16. gave no jurisdiction to the magistrates to make a compensation to the clerk of the peace; for the officers enumerated are all of an inferior description; and the general words at the end must be construed with reference to

(*a*) 1 *B.* & *A.* 312. (*b*) 4 *T. R.* 591.

the

the officers enumerated. Besides, at all events, the order of *December* 1815, was bad on the face of it. For it was a general order, and prospective, and the justices have no power to make a prospective order. If so, the treasurer ought not to have obeyed it. He was then stopped by the Court.

ABBOTT C. J. This case has come before the Court rather in an imperfect manner. It appears, however, to stand thus: By an order, made *June* 25th, 1818, the treasurer's accounts for the county of *Lancaster* were allowed at the annual general sessions by the magistrates there assembled. That order has been brought up into this court by certiorari, and a motion has been made to quash such part of the order as allows the sum of 148*l.* 5*s.* 8*d.* to the treasurer. That motion is supported by an affidavit, stating that the allowance was made, not upon any calculation of the work done by the clerk of the peace, but by a poundage upon the sums levied under the rate. On the other side, an order of sessions, dated 4th *December*, 1815, is produced, by which this poundage was allowed; and, supposing that order to have been made by a competent tribunal, I might perhaps think that that order ought to have been removed into this court before we could proceed to quash the part of the present order before referred to, inasmuch as the treasurer would be warranted in making such payment, in obedience to the order of *December*, 1815. But I am of opinion, that the sessions have no jurisdiction to make a prospective order of this sort for an allowance to the clerk of the peace by way of poundage. And if that order was made

1819.

The King *against* Williams.

made by a tribunal which had no such jurisdiction, the payment by the treasurer was without authority, and ought not to be allowed in his accounts. It has been ingeniously put in argument that the order in 1818, after the work had been done by the clerk of the peace, may be considered as an original order by the Court making him a proportionate allowance for his trouble. But, I think, that it is impossible so to consider it. In the first place, it is not the ordinary course of proceeding to make such an original order at the time of examining the treasurer's accounts. The magistrates, upon that occasion, only examine whether he has properly given credit for the sums received by him, and that the sums stated to be paid by him are properly vouched. In the second place, it is to be observed, that the voucher for this individual payment, which is here returned with the order of sessions, shews most manifestly, that this sum was paid by virtue of the order of *December*, 1815. It is impossible, therefore, to consider the order of *June*, 1818, as an original and substantive order; or, indeed, as any thing else than an order allowing an account expressly founded on the order of *December*, 1815, which, it appears, was made by a court wholly without jurisdiction. I am, therefore, of opinion, that that part of the order of sessions, making allowance to the clerk of the peace, should be quashed.

Bayley J. It is not necessary, upon the present occasion, for the Court to decide whether the sessions, under this act, have a power to make any compensation to the clerk of the peace. At present, I am not satisfied that the clause relied upon does not give them that power.

1819.

The KING *against* WILLIAMS.

power. For the officers are there enumerated, without any reference to rank, priority, or arrangement in any other resspect; and, not being named according to any gradation or rank, it seems to me that the general words at the end are not necessarily restrained so far as to exclude the clerk of the peace. But it seems to be quite clear, that the present order cannot be supported. For the item is this: "To the clerk of the peace; his fees on rolls issued, 35,589*l.* 17*s.*, at one penny per pound, 148*l.* 5*s.* 8*d.*" Now that is primâ facie an objectionable allowance; for this is not the proper way of remunerating an officer, being according to the quantum of the rates collected, and not according to his trouble. Then that being so, it was incumbent on the treasurer, who had made that payment, to shew some order of sessions authorizing it; for when his accounts were before the magistrates, they ought only to have allowed such items as were so authorized. Now the only order produced is that of *December*, 1815. But I am of opinion that the sessions had no jurisdiction to make such a prospective order, which was to last an indefinite time. The compensations to the officers are to be paid out of the monies levied by any county-rate; and if they are to make a compensation, the magistrates ought to see what the trouble has been, or is likely to be, without any reference to the quantum to be collected under any specific rate. And, unless they can do that, which never can be the case in an order of this description, it is utterly impossible to say that they have a jurisdiction to make any such order. Besides, there is also an insuperable difficulty arising from the circumstance, that no such order can be removed by certiorari after six months have clapsed; so that unless

within

1819.

The King *against* Williams.

within the first six months such an order were removed, it would be binding for ever; and that, too, upon persons who, at the time when the order was made, were not inhabitants of the county, and so had no opportunity of contesting the question. I think, therefore, that this item in the treasurer's accounts ought to have been disallowed, and that that part of the order of sessions which allowed it ought to be quashed.

Holroyd J. I am of the same opinion, that this rule should be made absolute; and that for the reasons already given by the Court, with which I entirely concur. (*a*)

Order of Sessions quashed accordingly.

(*a*) *Best* J. was in the Bail Court.

Saturday, November 20th.

The King *against* The Margate Pier Company.

A writ of mandamus to a corporation, commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied: Held, that this was a fatal objection to the writ, and might be taken after the return, or at any time before the issuing of the peremptory mandamus. Quære, whether, in such a case, a mandamus will lie.

MANDAMUS. The writ stated, that a rate of 1*s.* 6*d.* in the pound was duly made on or about the 17th *April* last, for the relief of the poor of the parish of *St. John the Baptist*, in the *Isle of Thanet*, in the county of *Kent*, in which parish the pier and harbour of *Margate* are situated; and that such rate was duly published, and that by it the defendants were rated at the sum of 150*l.*, for and in respect of the pier and toll-houses, &c. erected thereon. It further stated an application to the defendants, and a neglect and refusal to pay the rate; and concluded by commanding

pay-

1819.

The KING *against* The MARGATE Pier Company.

payment to be made to the overseers. To this writ, the defendants made a special return. When the case came on for argument,

Marryat, for the defendants, took two objections to the writ; first, that the writ did not state that the defendants had no effects on which a distress could be levied, which was the ordinary remedy, in case of the non-payment of a poor's rate; and, secondly, that no mandamus would lie for the non-payment of a poor's rate.

Gurney and *Bolland*, contrà, admitted the first objection to be a fatal one, but contended, that it was now too late to be put as an objection; and they cited *Rex* v. *The Mayor of York* (*a*), in which it was so expressly laid down by Lord *Kenyon* and *Buller* J. A party who has such an objection, is not to wait till after the return has been made, and then to come and take the objection, but he ought to apply, in the first instance, and move that the writ should be quashed.

Marryat, in support of the objections. The case of *Rex* v. *The Mayor of York* is directly at variance with the older authorities. The case of *Taylor* v. *The City of Gloucester* (*b*), *Rex* v. *City of Chester* (*c*), *Rex* v. *The Overseers of Shepton Mallet* (*d*), *Rex* v. *The Mayor of Abingdon* (*e*), *Regina* v. *The Parish of Littleport* (*f*), *Rex* v. *Mayor of Tregony* (*g*), *Rex* v. *Ward* (*h*), *Moore*

(*a*) 5 *T. R.* 74.
(*b*) 1 *Rol. R.* 409.
(*c*) 5 *Mod.* 10.
(*d*) 5 *Mod.* 420.
(*e*) 2 *Salk.* 699. 1 *Ld. Raym.* 559. *S. C.* *Carth.* 499.
(*f*) 6 *Mod.* 97.
(*g*) 8 *Mod.* 111. 127.
(*h*) 2 *Str.* 893.

v. *Mayor*

1819.

The KING *against* The MARGATE Pier Company.

v. *Mayor of Hastings* (a), and *Rex* v. *The College of Physicians* (b), are all authorities to shew that such an objection may be taken after the return; and in *Rex* v. *Mayor of Abingdon*, even after the return had been held to be bad, in a subsequent term, exceptions were allowed to be taken to the writ, as appears from the report in *Carthew*; and no authority can be found which supports the position relied on by the other side, which was only a dictum, and not the principal point decided in the case. On the second objection, he contended, that no instance could be produced of a mandamus similar to the present. This is a mandamus to enforce the payment of money. Now the Court have never interposed in cases of a private nature, although a party may have no remedy at law. Suppose an individual, living within the local jurisdiction of *Wales*, sued for a debt, after judgment recovered, withdrew himself out of the local jurisdiction, there the plaintiff had no remedy to enforce his judgment; yet no one ever thought of applying for a mandamus in such a case; but a remedy was obliged to be given by parliament. So, if a man be ordered to pay money by the sessions, and does not pay it, can a mandamus go to compel him to do so? and in *Emerson* v. *Lashley* (c), after the action had failed, a mandamus might have been applied for, but no such application was made. It has been said, that there has been an instance of a mandamus of this sort to the *Strand Bridge* Company. Now that probably turned upon the particular provisions of the private act there; for where, as is not

(a) *Cas. temp. Hard.* 353. 362. 2 *Str.* 1070.
(b) 5 *Burr.* 2740. (c) 2 *Hen. Bl.* 248.

un-

1819.

The KING *against* The MARGATE Pier Company.

unfrequent in such acts, no specific remedy at all is given against the company, a mandamus will lie. But where a specific remedy is once given, no mandamus will lie, even after that specific remedy has been, by circumstances, rendered unavailing. The general proposition is, that a mandamus will only lie where both in law and in fact there is no other remedy given. In *Rex* v. *Bristow* (a), it was held that no mandamus could be granted, because the proper remedy was by indictment. And in *Stevens* v. *Evans and Another* (b), *Dennison* J. laid it down as a rule, that where a new statute prescribes a particular remedy, no other remedy can be taken, and that therefore no action would lie for a poor's rate. So here no mandamus ought to go to compel a payment of a poor's rate, the only remedy being by distress and sale of the parties' goods. Suppose an action against a corporation, in which the individuals of it were not personally liable, and the corporation had no property capable of being taken in execution. There is no instance ever heard of, in which a mandamus has been applied for to compel the payment of the debt. Yet such cases must have frequently occurred. This is a novel application, the extent of which it is not easy to foresee.

ABBOTT C. J. I am of opinion, that it is not too late now to take an objection to the writ. Suppose an action brought for a false return, if the writ be defective, the party bringing the action can never be entitled to judgment. And, besides, in a case like this,

(a) 6 *T. R.* 168. (b) 2 *Burr.* 1157.

where

181[illegible].

The King *against* The Margate Pier Company.

where there is no writ of error, the Court will surely, at any time before a peremptory mandamus issues, suffer itself to be informed, and examine whether the writ is so framed as to give them jurisdiction. It is undoubtedly more convenient that such an objection should be taken at first, and that will probably account for the observations of Lord *Kenyon* and Mr. J. *Buller* in the case cited. But the other authorities, shewing that such an objection may at any time be taken, do not seem to have occurred to these learned Judges, when those observations were made. Then, as to the objection itself, it appears to me, that the ground of such an application as the present is, that there is no other remedy, and therefore, it is clear, that the writ ought to state that fact distinctly; if not, it would deprive the defendants of the power of traversing that most material fact, for they are only to answer what is alleged in the writ. I think, therefore, that this is an objection in substance and not in form, and that we ought to quash the writ. That being so, it becomes unnecessary to pronounce a decision on the point, whether any mandamus will lie in the present case.

Writ of mandamus quashed.

1819.

NIAS *against* ADAMSON and Others.

Tuesday, November 23d.

Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture, &c., in his possession, and afterwards, notwithstanding such agreement, seized the same, it was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees.

TRESPASS for breaking and entering plaintiff's house, and seizing his goods. The defendants pleaded the bankruptcy of the plaintiff. Replication, that the defendants committed the trespass of their own wrong; upon which issue was joined. At the trial, at the last *Lent* assizes for *Essex*, before *Park* J., the only question was, whether the seizure of the goods was justifiable. The defendants were acting under the authority of the assignees of the plaintiff, *Nias*, who became bankrupt in *May*, 1816, and had not obtained his certificate. It appeared, that at a meeting of creditors under the commission, held pursuant to notice in the *Gazette*, for the purpose of assenting to, or dissenting from, the sale of the bankrupt's furniture, and to consider whether it should be by public or private contract, it was at first proposed that the bankrupt's furniture should be given up to him. After some debate, it was finally arranged by the creditors then present (who were, however, not the whole, nor even a majority, in number, of the whole body) that, on the payment of 100*l.*, the furniture should be given up. Accordingly, a friend of the bankrupt, Mr. *Collinson*, advanced that sum, and the bankrupt remained in possession. In *January*, 1817, the assignees took possession of the furniture, notwithstanding the previous agreement; and, on the 31st *January*, sold the goods in question, for the seizure of which the action was brought. The learned Judge told the jury, that

1819.

NIAS *against* ADAMSON.

though the general principle was quite clear, that the property acquired by a bankrupt between his bankruptcy and certificate belonged to his assignees, yet, that, in his opinion, the peculiar circumstances of this case entitled him to maintain this action, inasmuch as the assignees, having obtained the consent of the creditors called together by advertisement, had here entered into a contract with the bankrupt for the sale of these very goods, and had received the money from a friend of the bankrupt. The jury found a verdict for the plaintiff, damages 317*l.* *Nolan*, in last *Easter* term, obtained a rule nisi for a new trial, on the ground of a misdirection of the learned Judge, in this respect. And now,

Marryat, *Gurney*, and *Comyn*, shewed cause. There is no dispute that, generally speaking, all a bankrupt's property, acquired both before and after the bankruptcy, belongs to his assignees; but the question is, whether, here, there are not circumstances to take the case out of that general rule. Here, the assignees have made a contract with the bankrupt; for they have agreed, that for the sum of 100*l.* he should have his furniture, and that agreement was sanctioned by the assent of a meeting of creditors. In *Coles* v. *Barrow* (*a*), the majority of the Court of Common Pleas were of opinion, that an uncertificated bankrupt might maintain an action, even against his own assignees, upon a contract made with them; and it would be manifestly inconsistent with that decision, if they were to be able to seize, afterwards, the property

(*a*) 4 *Taunt.* 754.

ac-

1819.

NIAS *against* ADAMSON.

acquired by him in such an action. It would be manifestly unjust, if the assignees were here to be permitted to retain the 100*l.* paid for the goods, and still to seize the goods again. Besides, here, a meeting of creditors have, as it appears, assented to the agreement; and a third party, viz. *Collinson*, is interested, for he paid the 100*l.* on this express stipulation. It was the duty of the assignees to dispose of the bankrupt's property: here, they have so done; and if they have made an improvident bargain, this is not the mode to set it aside, for they ought rather to have petitioned the Lord Chancellor for that purpose.

Nolan and *Montagu*, contrà. If *Collinson* has any complaint to make against the assignees, it is for him to apply to the Lord Chancellor. If the assignees were to do so, the Lord Chancellor would tell them that the remedy was already in their own hands, viz. by seizure of the goods. All the bankrupt's property, acquired as well before as subsequent to the bankruptcy, vests in his assignees till he has obtained his certificate; and the cases on this subject may be divided into two classes: first, where the assignees do not interfere; and, secondly, where they do. In the first class of cases, no doubt, the uncertificated bankrupt is capable of acquiring and retaining property, *Chippendale* v. *Tomlinson* (*a*), *Webb* v. *Fox* (*b*), *Sill* v. *Osborn* (*c*), *Webb* v. *Ward*. (*d*) But he is as clearly not entitled to retain any property as against his assignees, *Troughton* v. *Gitley* (*e*), *Evans* v. *Mann* (*f*), *Kitchen* v.

(*a*) *Cooke, B. L.* 432. ed. 1817
(*b*) 7 *T. R.* 391.
(*c*) 1 *Esp.* 110.
(*d*) 7 *T. R.* 296.
(*e*) *Ambler*, 630
(*f*) *Cowp.* 570.

1819.

NIAS against ADAMSON.

Bartsch (*a*), *Hesse* v. *Stevenson* (*b*), *Coles* v. *Barrow* (*c*), and *Hull* v. *Pickersgill* (*d*), are all the authorities on this point. In all of them, except the case of *Coles* v. *Barrow*, the above position is distinctly recognised. But that case is not entitled to weight; for it was only the decision of two Judges, *Mansfield* C. J. dissenting at the time of the judgment, and *Lawrence* J., who had dissented also when the rule was moved, having, in the interval, left the Court of Common Pleas. And this is directly at variance with both the cases of *Hesse* v. *Stephenson*, and *Hull* v. *Pickersgill*, the latter of which was, in effect, an action against the assignees by the bankrupt. It is also at variance with the principle of the bankrupt laws; for the reason why a second commission of bankruptcy cannot be supported against an uncertificated bankrupt is, that he has no property. So, a stranger cannot give property to him as against his assignees, as in the case of a legacy, *Tudway* v. *Bourn* (*e*); nor can a creditor, *Webb* v. *Ward* (*f*); nor a meeting of creditors, because a power is given to them by statute only in cases of referring disputes to arbitration; nor can the assignees themselves do it so as to bind any subsequent assignees. The ground is, that though all these respective persons have a full right to give up their own property, they cannot give up the property of the other creditors.

Bolland, who was to have argued on the same side, was stopped by the Court.

(*a*) 7 *East*, 62.
(*b*) 3 *B.* & *P.* 578.
(*c*) 4 *Taunt.* 754.
(*d*) 1 *Brod.* & *Bing.* 283.
(*e*) 2 *Burr.* 716.
(*f*) 7 *T. R.* 296.

ABBOTT

1819.

NIAS *against* ADAMSON.

ABBOTT C. J. It is our duty, as a court of law, to decide this case upon legal principles; and it is clear, that by law, an uncertificated bankrupt cannot possess property; for, as soon as it comes to his possession, it vests in his assignees, and may be seized by them. But it is said that this is an excepted case, and that here the assignees are estopped from saying that this property did not belong to the bankrupt. The facts are these: A commission issued against the plaintiff; and, at a meeting of creditors, it was at first proposed to leave the bankrupt in possession of the property in question; but some difficulties having arisen respecting this matter, *Collinson*, a friend of the bankrupt, proposed to pay 100*l.*, in order to induce the creditors to permit the bankrupt to remain in possession; and this, at a meeting of the creditors, was agreed to, and the bankrupt accordingly remained in possession, until he was dispossessed by the assignees. Now, it is said, that if the assignees may do this, it is a fraud upon *Collinson*. We cannot, however, look, in the present case, at *Collinson*'s rights. It is clear, that the property in the goods was intended to vest in the plaintiff; and, if so, it will go to his assignees, unless they are estopped from setting up such a claim. Then, how are they so estopped? In order to ascertain that, we must look at the duty they are to perform. They are entrusted with a statutable authority, which is to be executed for the common benefit of the creditors at large, and are not to be guided by the will of any particular body of creditors; and the Court cannot hold that they are estopped, without holding, at the same time, that the acts of a meeting of such creditors will bind those who are absent. It being, therefore, the duty of the

1819.

NIAS *against* ADAMSON.

assignees, in their peculiar character, to protect the interest of the absent as well as present creditors, I think that, in this case, they were not estopped from claiming these goods, and that there ought to be a new trial.

BAYLEY J. When this case first came before the Court, the impression on my mind was, that it was unjust for the assignees, who had themselves treated the bankrupt as the vendee of the goods, afterwards to treat him as not being the vendee, and to seize the goods. But I am satisfied that that impression was wrong. An uncertificated bankrupt has no power, by law, of acquiring property for himself: but all the property which he does so acquire passes to his assignees, who may seize it whenever they choose to exercise that right. That is the general rule of law; and the only question raised in this case, is, whether there be any difference where the bankrupt obtains the property from third persons, and where he obtains it from his own assignees; and it is contended, that in the latter case the assignees are estopped from making the claim. But the assignees who represent the individual creditors, cannot be estopped, unless all the creditors be estopped also. For, inasmuch as the creditor can only make his claim through the assignees, an estoppel of the assignees would affect his interest, which the assignees are not competent to bind. If, indeed, all the creditors concurred in the act of the assignees, it might make a difference; but, if that be not so, it seems to me, that the bankrupt can only obtain a defeasible property from the assignees, and that any creditor may put the assignees in motion for the purpose of reclaiming the property

perty left in the bankrupt's possession. And there is no hardship in this, for it is clear, that the goods cannot be purchased with money belonging to the bankrupt himself, and if purchased by money belonging to a friend, it is as easy for the friend to buy it, and to have the legal property transferred to him. It is inconsistent with the duty of the assignees to sell the goods for less than their full value to any one, and if they sell them for their full value, it seems to me, that the vendee should be the real person from whom the money comes. I think that, in this case, the bankrupt only acquired a property in these goods, subject to be defeated by the assignees; and, consequently, that this verdict must be set aside.

HOLROYD J. I am of the same opinion, that this action is not maintainable. There is no doubt of the general principle of law, that an uncertificated bankrupt can have no assignable property. But, it is said, that, in this case, the assignees have, themselves, treated him as capable of acquiring property, and that they are estopped from making the present claim, having already received a pecuniary consideration for leaving the bankrupt in possession of the goods. Whether *Collinson* may or may not maintain an action, or be entitled to relief in equity, for the money advanced by him to the assignees, is not the present question. What we have to determine is, whether an absolute property in these goods passed to the bankrupt. Now, the act of a meeting of particular creditors will not, in such a case as this, bind the creditors at large; and, if so, it is competent for any one of the creditors to compel the assignees to put the law in force, and, if they refuse, to

1819.

NIAS against ADAMSON.

apply for their removal. As all the creditors, therefore, are not estopped, the bankrupt could only acquire a defeasible property in these goods, which the assignees had consequently a right to reclaim. The present action, therefore, is not maintainable.

BEST J. I am of the same opinion. The case of *Coles* v. *Barrow* is very distinguishable from the present case, inasmuch as there the action was brought to recover from the assignees a recompense for the personal labour of the bankrupt, whereas here it was brought for property belonging to the bankrupt. And, besides, if Mr. Justice *Lawrence* had continued in the Court of C. P., that decision would probably not have been pronounced. It is not, therefore, entitled to any great weight. The authority of that case is much broken in upon by the case of *Hesse* v. *Stevenson*; there Lord *Alvanley* says, "Can there be any doubt that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot, indeed, take the profits of his daily labour: he must live; but if he accumulate any large sum, it cannot be denied but that the assignees are at liberty to demand it." Besides, the statute of *Eliz.* seems to me, in its very terms, to convey away every species of property which the bankrupt has or can, by any means, acquire; and I think we should violate that statute if we were to hold, that it was competent to the bankrupt to bring an action against the assignees for doing their duty by seizing the property in question. If *Collinson* be aggrieved by this proceeding, he may apply to the Lord Chancellor for relief; but I do not see how the assignees could have done so with effect, in the present case. Upon the whole, I am of opinion, that the

pro-

property, in the present case, belonged to the assignees, as trustees for the creditors at large, and that this action is not maintainable. The rule, therefore, for a new trial, must be absolute.

1819.

NIAS *against* ADAMSON.

Rule absolute.

WOODBRIDGE *against* SPOONER and Wife, Executrix of BANCE.

Wednesday, November 24th.

Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to shew, that at the time of taking it, it was agreed that it should not be payable till after the decease of the maker.

ACTION on a promissory note, given by the testatrix to plaintiff, for 100*l.*, dated 1st *September*, 1817, payable "on demand, for value received, and his kindness to me." Plea, general issue. At the trial before *Abbott* C. J., at the sittings after last *Easter* term, the defendant gave in evidence, declarations of the testatrix at the time, that the note was not to be payable till after her death, and that it was to be given in addition to a legacy of 20*l.* left in her will. It appeared, also, that the testatrix was in poor circumstances, and that she was not, altogether, possessed of more than 300*l.* or 400*l.*, and that she lived almost entirely at the plaintiff's house. *Scarlett*, for the plaintiff, contended, that this evidence ought not to be received. *Abbott* C. J. received the evidence; and being of opinion that it shewed that the note was a testamentary paper, and ought to be so proved, nonsuited the plaintiff, giving him leave to move to enter a verdict for 100*l.*, in case the Court should be of a different opinion. *Scarlett* having in last *Trinity* term obtained a rule nisi accordingly,

Marryat

1819.

WOODBRIDGE *against* SPOONER.

Marryat and *Adams* shewed cause, and contended, that this evidence was admissible. The note was merely evidence of a debt, and the parol testimony proved, that there was no existing debt, but a mere promise of a sum of money after the decease of the testatrix, and the plaintiff could not have recovered upon it in her life-time. Suppose a deed was delivered as an escrow, or a bill at two months given with an express agreement at the time, that the party should, at the end of two months, be allowed to renew it; may not these circumstances be given in evidence, in case of an action brought on the deed or bill? If so, there was clearly enough to go to the jury, that this note was agreed not to be demandable till after the death of the testatrix. *Tate* v. *Hilbert* (*a*) is an authority to shew, first, that evidence is receivable of what takes place at the time of giving a promissory note; and, secondly, that a promissory note may be the subject of a donatio mortis causâ. And *Lawson* v. *Lawson* (*b*) is to the same effect.

Scarlett and *Abraham*, contrà, relied on *Hoare* v. *Graham* (*c*), and *Free* v. *Hawkins*. (*d*)

ABBOTT C. J. It struck me at the trial, that this was a testamentary promise in the nature of a legacy, and if so, that the plaintiff could not recover at law. I was led to this conclusion, in some degree, by the language of the first count of the declaration, in which

(*a*) 2 *Ves. jun.* 111. 4 *Brown, C. C.* by *Eden*, 286.
(*b*) 1 *P. Wm.* 441. (*c*) 3 *Campb.* 57. (*d*) 1 *B. Moore*, 535.

it

it was stated, that the deceased promised the plaintiff that she would, at her decease, give him 100*l.* more than a legacy of 20*l.*, which she meant to leave him. It is admitted, however, that unless the evidence was properly received, I ought not to have drawn that conclusion; and it seems to me now, that the evidence was not properly receivable. There is no doubt that a proper and sufficient consideration existed for this note; and the evidence does not negative that part of the case. But its object was to shew that a promissory note, which in terms appeared to have been payable on demand, was agreed not to be payable till after the decease of the maker. Now it is contrary to the rules of law to admit extrinsic evidence to shew, that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself.

BAYLEY J. I am of opinion that this evidence was inadmissible, and that even if it were admitted, it ought not to prevent the party from recovering. It appears, on the face of the note, to have been given for a sufficient consideration, and it could not have been the intention that the compensation should rest on the ground of a donatio mortis causâ, for then it would be revocable, but that it should be secured by a binding instrument. Under these circumstances the note was given; and it seems to me, that it was obligatory on the party making it, and that even if there were a secret understanding, that the note should not be presented for payment until after the decease of the maker, still it would be binding on her executors. Besides, here the note, on the face of it, purports to be payable

on

1819.

Woodbridge *against* Spooner.

on demand, and it would be extremely dangerous to allow a party, who has signed such an instrument, afterwards to say, that it was not so payable. It is a general and useful rule, that no parol evidence is admissible, to contradict that of which there is written evidence; and I think, therefore, that this evidence was not admissible.

Holroyd J. I am of the same opinion. This evidence was adduced, not to shew a want of consideration, or that the consideration for the note was illegal, or that it was not delivered to the party to be made use of for his own benefit. The utmost extent to which it could go, was an attempt to prove, that the note was not payable, as on the face of it it imported to be. This, therefore, was to contradict the note itself, which, by the rules of law, a party is prohibited from doing. Even if the evidence had been received, I think it would not make a material difference in the result.

Best J. The parties in this case are bound by a written contract, and it is contrary to the first rules of law to admit parol evidence to vary or contradict it, and the only exception to those rules is, where a contract is illegal. I can see no solid ground of distinction between the present case and that of *Free* v. *Hawkins*. It is said, that in this case, there is a fraud on the legacy duty. But if this note was not revocable, it could not be a testamentary gift; and if so, there could be no fraud on the legacy duty. I am, therefore, of opinion, that this nonsuit must be set aside, and that the verdict must be entered for the plaintiff.

Judgment for the plaintiff.

1819.

RICHARDSON and Others, Assignees of THOMPSON, a Bankrupt, *against* NOURSE and CHRISTIAN.

Thursday, November 25th.

The Court will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; and, therefore, where the captain of a ship, at an intermediate port, in order to pay for repairs, had necessarily sold part of the cargo, at a price higher than it would have fetched at the port of destination, and, upon a reference to settle the average loss between the ship-owner and charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination, the Court refused to set aside the award.

CAMPBELL, on a former day, had obtained a rule to shew cause why the award in this case should not be set aside. The bankrupt was owner of a ship, which was chartered to the defendants for a voyage to the *East Indies* and back. While returning home with a cargo, partly belonging to the charterer and partly to other shippers, she encountered a hurricane, and was driven into the *Mauritius*. The captain there necessarily sold some cotton and rice, part of the homeward cargo belonging to the charterers, to pay for the ship's repairs and necessary disbursements. Other goods were then taken in on freight in place of those so disposed of, and the ship returned safely to the port of *London*. The goods sold at the *Mauritius* fetched a better price than they would have fetched had they been delivered here to the charterers. The general average was settled as between the owner of the ship and the different owners of the homeward cargo by an arbitrator, who gave the owner of the ship credit only for such a sum of money, in respect of the goods sold at the *Mauritius*, as they would have produced at the ship's arrival in *London*, deducting freight and charges. Disputes having then arisen between the charterers and the assignees of the ship-owner, who had become bankrupt, respecting the sum for which the charterers were entitled to credit in respect of their goods sold at the

Mauritius,

1819.

Richardson *against* Nourse.

Mauritius, and other matters, there was a general reference to three arbitrators, who, by the award in question, determined that the charterers were entitled to credit for the full amount of the sum which the goods produced at the *Mauritius*.

Gaselee shewed cause, and contended, that the arbitrators were fully justified in allowing the charterers the amount which their goods produced; and he cited *Campbell* v. *Thomson*. (*a*)

Campbell and *D. F. Jones*, contrà, insisted that it is an established rule of law, that where, during a voyage, a part of the cargo is necessarily sold to pay for the repairs of the ship, the owner of the goods is to be paid for them by the owner of the ship, according to the price which they would have fetched on the ship's arrival at the port of destination, deducting freight. They relied upon *Abbott* on Shipping, 370., and the authorities from foreign writers there collected. The rule cannot be varied by the fall of the market at the port of destination; for, as the owner of the ship would have been liable for twice the amount which the goods actually produced had there been a rise in the market, he ought in justice to have the benefit of the fall. The goods so sold are still considered as on board the ship, insomuch that if the ship be afterwards lost, before the completion of the voyage, the owner of the ship is entirely discharged from the demand; and the owner of the goods cannot complain, if he is placed in exactly as good a situation as if the goods had been actually delivered to him according to the bill of lading.

(*a*) *Starkie*, 490.

1819.

RICHARDSON *against* NOURSE.

ABBOTT C. J. The general rule in the case of an average loss is, to value the goods at the clear price they would have fetched at the port of destination. Questions of this kind most frequently arise in cases of jettison. In the present instance, the goods have been sold for the necessary repairs of the ship while on the voyage, and have actually fetched a higher price than they would if they had arrived at the port of destination. There is no decided case precisely in point. The possibility even of the goods fetching any price higher than that of the port of destination did not occur to any of the writers whose works have been referred to in the course of the argument. It must be recollected, too, that this was a reference to mercantile men, and they, perhaps, may have decided the question upon mercantile usage. I cannot say that their decision was wrong: for, by holding that the owner of a ship may lose, but that he can never gain by such a sale as this, we shall furnish the strongest possible inducement to him, to take care that all the goods are conveyed to their place of destination. I do not go the length of saying that where arbitrators proceed upon a mistake of a clear principle of law, that the Court will not set aside their award. But I cannot, in this case, say that the arbitrators have decided contrary to any clear, well-established principle of law; and I think, therefore, that this rule should be discharged.

BAYLEY J. It does not appear to me that this award is inconsistent with any plain principle of law. If the point had been considered questionable, the arbitrators might have been desired to state the facts upon the face of their award for the opinion of the Court. If the point was not made before the arbitrators, there is no ground

1819.

RICHARDSON *against* NOURSE.

ground for the present application. If the point was made, and the arbitrators declined to state the facts, they have taken upon themselves to decide the question conformably to mercantile usage, and I am not prepared to say that that decision, either upon authority or principle, is clearly wrong. I think, therefore, that this rule should be discharged.

HOLROYD J. The Court will not set aside an award on the ground merely that an arbitrator is mistaken in a point of law; but the Court must be clearly satisfied that he would not have made such an award, if he had known what the law was. Now I am by no means certain, in this case, that if the arbitrators had known the law to be what it is contended to be on the part of the plaintiffs, they would have come to a different decision. For there is strong ground for contending that the owner of goods should receive a compensation for the goods sold, according to their highest value. If the master could get money by other means, he had no right to sell; and if he had sold the goods, the owner ought to be entitled to the actual proceeds. For the owner of the ship, in the event that has happened, ought not to be allowed to make any profit by such sale.

BEST J. When the objection to an award is, that it is contrary to law, that ought to appear very clear to induce the Court to set aside the award. Now it is not necessary here to decide the question, whether the arbitrators have decided contrary to law or not. It is sufficient to say, that that does not clearly appear; and, therefore, that this rule should be discharged.

Rule discharged.

1819.

WILSON, D.D. *against* M'MATH.

Thursday, November 25th.

The ecclesiastical court has jurisdiction, ratione loci, over the order and proceedings of vestry meetings, held in a church; and, therefore, where a rector had libelled, in that court, a parishioner, for preventing him from presiding as chairman at such a meeting, a prohibition was refused.

GURNEY had obtained a rule nisi for a writ of prohibition, to be directed to the Court of Peculiars of the Deanery of the Arches, *London*, *Shoreham*, and *Croydon*, to prohibit it from further holding plea of the matters there depending between these parties. It appeared, from the affidavits, that on the 16th *March* last, a vestry meeting for the parish of *St. Mary Aldermary* was held for the purpose of receiving a report of the proceedings in an action of ejectment, brought by the Drapers' Company against the rector and churchwardens of the parish. At this meeting, held in the church, the rector, Dr. *Wilson*, attended, as well as the defendant, *M'Math*, and other parishioners. Upon Dr. *Wilson* proceeding to take the chair, one of the parishioners moved, and it was accordingly carried, that Mr. *M'Math* should take the chair, upon which Mr. *M'Math* took the chair at the opposite end of the table to the rector. The rector, after remonstrating in vain, finally left the place, and the business then proceeded. On the 8th *May*, he instituted the present suit in the ecclesiastical court, for disturbing and interrupting him while presiding at a vestry meeting. The defendant was cited to appear, and did appear, and prayed that the rector might exhibit articles. On the 11th *November* the ecclesiastical court were about to give judgment on the admissibility of the articles, according to notice given in the preceding term, but, on the day preceding, the rule for a prohibition was obtained,

1819.

WILSON *against* M'MATH.

Gaselee and *Marriott* shewed cause. If the defendant meant to dispute the jurisdiction of the ecclesiastical court in this case, he should not have contented himself with a general appearance, but should have appeared under protest. If a suit be instituted for tythes, and the defence be a modus, it is necessary to plead the modus before an application for a prohibition can be made; because, till plea pleaded, the ground of prohibition does not appear. But, upon the face of these proceedings, it appears, that the ecclesiastical court has jurisdiction; for this is a matter relating to the order and decency of a meeting held in a church. And the rector was entitled to preside at this meeting, *Stoughton* v. *Reynolds* (a): *Gibson's Codex*, vol. ii. 1476., gives the form of appointment of a select vestry, which requires the minister or curate "always to be present, if, conveniently, he may be had, and to propound the business to the public notice and consideration:" they were then stopped by the Court.

Gurney and *Curwood*, in support of the rule. Here the ecclesiastical court had no jurisdiction at all; for it was a vestry meeting not in the least relating to ecclesiastical matters. And the mere circumstance of the meeting being in a church will not be sufficient: an election of a parish clerk is often made in church, yet it has not been held that the cognizance of such an election belongs to the ecclesiastical court. So, cutting trees in a church-yard, or a deputy parish clerk doing duty without licence from the ordinary, are not matters within the jurisdiction of the ecclesiastical court; and in the latter case a prohibition has been granted.

(a) 2 *Str.* 1045. *Cas. temp. Hard.* 274. *Fortescue*, 168. *S. C.*

Peak

Peak v. *Bourne*. (*a*) As to the rector's right to preside, that is very doubtful; for in *Stoughton* v. *Reynolds*, in the report *Cas. temp. Hardw.*, Lord *Hardwicke* is reported to have said, "There is, indeed, a notion that the parson has a right to preside;" from whence it may be inferred, that he did not think the common notion correct. And the passage cited from *Gibson's Codex* only applies to special vestries.

ABBOTT C. J. I am of opinion that the ecclesiastical court has jurisdiction in this case. For this is a meeting held in a church, and it is most fit that that court should have authority over the order and proceedings of a meeting held in such a place. That being so, I abstain from giving any opinion as to what ought to be the decision of that Court upon the question, whether the rector has the right of presiding at this meeting. I think, therefore, that this rule should be discharged.

BAYLEY J. I am of the same opinion. In this case the place of meeting being the church, gives to the ecclesiastical court jurisdiction. It may be necessary, for the purpose of preserving order and decency at such an assembly, that the rector, who is also the person to whom the freehold of the church belongs, should preside at it; and I think the 58 *G.* 3. *c.* 69. *s.* 2. confirms this view of the case; for that act gives a power of electing a chairman only in case of the absence of the rector, vicar, or curate.

(*a*) 2 *Str.* 942.

HOLROYD

1819.

WILSON *against* M'MATH.

HOLROYD J. I am of the same opinion. The ecclesiastical court has jurisdiction ratione loci. And it was on that principle that *Wenmouth* v. *Collins* (*a*) was decided.

BEST J. It is not necessary, in this case, to decide whether the rector has the right to preside at vestry meetings; although I trust that this right, which appears so essential for the preservation of order, will be ultimately found to be in him. All that at present appears is, that the rector has proceeded against the defendant for an alleged impropriety, committed in the church; and I am clearly of opinion, that that is a matter within the cognizance of the ecclesiastical court. I think, therefore, that this rule should be discharged.

Rule discharged, with costs. (*b*)

(*a*) 2 *Ld. Raym.* 850.

(*b*) We have obtained the following copy of the judgment pronounced by Sir *John Nicholl*; and as the question decided is one of very general importance, we have thought it would be acceptable to our readers to publish it.

The minister of the parish has a right to preside at vestry meetings.

This is a suit by the rector of *St. Mary Aldermary*, in the city of *London*, against a parishioner of that parish, for disturbing him in presiding at a vestry meeting. The offence is thus charged in the citation: "More especially for interrupting the rector when he had taken the chair as president, at a vestry meeting, held in the vestry room within the church of the said parish, preventing him from exercising the office of chairman or president at the said vestry meeting, and dispossessing him thereof." To this citation, an appearance was given on the part of Mr. *Mac Math*, the person cited. The appearance was absolute, and not under protest, and articles were prayed and given in, stating that Mr. *Mac Math*, at a vestry held for the parish of *St. Mary Aldermary*, in the vestry room, which is within and part of the parish church, on the 15th of last *March*, did interrupt the rector when he had taken the chair as president of the vestry, did prevent him from exercising the office of chairman or president of the vestry, and did dispossess him thereof, in the manner there set forth, which it is not now necessary more particularly to notice. The admis-

admissibility of these articles was opposed and debated, and the objections to them, as far as I could collect, stood on two grounds:

1. That the minister, as such, has no right to preside at a vestry meeting, and consequently that the interrupting him in so doing is not a disturbance.

2. That even if it be a disturbance, this Court has no jurisdiction to repress or punish it as an offence.

It has been stated that the suit is brought to ascertain the *right* of the minister to preside at these meetings, and not from animosity or vindictiveness on account of the particular transaction; and indeed, the form of the suit, and the manner in which the question has been treated on both sides, tend very much to confirm that statement. There are certain circumstances set forth in the articles, which possibly might have warranted the party in bringing a different suit; but the present mode has been adopted, in order to bring the general question to issue. The question is certainly one of considerable importance, both as affecting the station of a highly respected class of the community, the established clergy, and as affecting the peaceable and orderly proceedings of parochial meetings. The case is said to be a new one, so far as regards any *express* law, or any judicial decision on the subject. There is no statute, no canon, no reported judgment, either *expressly* affirming or *expressly* negativing the right. It nevertheless may exist as a part of the *common law of the land*, as a part of the lex non scripta, which is of binding authority, as much in the ecclesiastical as in the temporal courts. Indeed the whole canon law rests for its authority in this country upon received usage; it is not binding here proprio vigore. Moreover, this Court, upon many points, is governed in the absence of express statute or canon, by the jus tacito et illiterato hominum consensu et moribus expressum. It is true, that generally the existence of this jus non scriptum is ascertained by reports of adjudged cases; but it may be proved by other means, it may be proved by public notoriety, or be deducible from principles and analogy, or be shewn by legislative recognitions. Published reports of the decisions of ecclesiastical courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before; and some countenance is given to that notion from the *general usage and practice* of the kingdom; for it is pleaded in the articles, and on their admissibility must be taken as true, that the minister's presiding at vestry meetings, "is observed in and throughout the whole realm." The fact of such *general* usage for the minister so to preside is notorious; and has not been denied even in argument. Now such an usage unless absurd or improper) I take to found a common law right. Law writers, particularly Mr. Justice *Blackstone*, lay it down that "general customs, which are the universal rule of the whole kingdom, form the common law, in its stricter and more usual signification." Again, "the first ground and chief corner stone of the laws of England is immemorial custom."

Then the general immemorial usage being averred, is it a *reasonable* usage? For "the common law," says *Blackstone*, "is the perfection

 of

1819.

WILSON *against* M'MATH.

of reason: what is not reason is not law:" adding, however, "that the particular reason of every rule of law cannot be always assigned; it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume the rule to be well founded." Now this general usage, so far from being "flatly contradictory to reason," is admitted to be extremely proper. The propriety of the minister's presiding at vestries was in no degree controverted; all that was contended was, that it ought to be accepted as a *courtesy*, and not claimed as a right, for that the right of choosing a chairman belonged to the parishioners, and that the minister was present *merely as a parishioner*, having no greater right to preside than any other individual.

The practical inconvenience of the rule thus contended for is obvious and manifest. At meetings held so frequently as vestries are in many parishes, often very numerously attended, and where every parishioner paying rates has a vote, if the election of a chairman were always a preliminary measure, the consequence would be, that in parishes where animosities and divisions unfortunately existed, a large portion of the time for the transaction of business would be consumed in this preliminary contest; and the business of managing the concerns of the church and poor, in which the feelings of piety and benevolence are so desirable, would be preceded by a conflict exciting all the angry passions of man. To avoid these practical inconveniencies, as well as from other considerations of propriety and principle, the universal usage of the minister's presiding probably took its rise; for in every view the propriety is manifest, and the right is founded in sound principle.

The minister is *not*, in consideration of law, a mere individual of vestry, as has been contended: nor is he in any instance so described. On the contrary, he is always described as the first, and as an integral part of the parish. The form of citing a parish proves this position, namely as "the *minister*, churchwardens, and parishioners," he being *specially* named; — such is the legal description of a parish in all formal processes. So again, in the choice of churchwardens; if the minister and parishioners cannot agree in the choice of the two, the *minister* is to choose one, and the parishioners the other, unless controlled by special custom. So, again, churchwardens are directed by the canon to account before the *minister* and parishioners. So, far, therefore, from being a mere individual, the proper description of a parish, in vestry assembled, is "the *minister*, churchwardens, and parishioners in vestry assembled." The minister is denominated the Rector Parochiæ, the Præses Ecclesiasticus. The vestry itself is the meeting of an ecclesiastical district, namely a parish: it is held in an ecclesiastical place, in the church, or in a room which is part of the church, part of the consecrated building, from which the meeting itself takes its name of *vestry*, as being held in the room where the priest puts on his *vestments*. It meets for an ecclesiastical purpose; for though the sustentation of the poor is now carried on by rates, and overseers are appointed under special statutes, so that it has, in modern times, become more of a temporal concern, yet anciently it was a matter immediately of ecclesiastical

1819.

WILSON *against* M'MATH.

siastical duty and superintendence. So says *Prideaux* (Directions to churchwardens, edit. 1730, sect 20.) "The churchwardens were anciently the sole overseers of the poor; and it lay wholly on them, *under the direction of the minister*, to take care of all such as were in want," &c. In these meetings, then, of the parish, consisting of "minister, churchwardens, and parishioners," assembled in the church, for an ecclesiastical purpose, that the rector parochiæ should *not* preside, but be considered as a mere individual, would be most strangely incongruous, and that he and any other individual should be put in competition for the office of chairman, would be placing him in a degraded situation, in which he is not placed by the *constitutional* establishment of this country. In sound legal principle, he is the head and præses of the meeting.

To pronounce, then, against a right thus founded in usage and supported by reason, convenience, and propriety, would require some very clear and decided *authority* negativing the right, and establishing a different rule. The single authority resorted to is the case of *Stoughton* v. *Reynolds*; and that, indeed, was hardly relied upon as sufficient; for the argument went rather upon the absence of direct authority to support the right, than upon the adduction of any sufficient to negative it. The case of *Stoughton* v. *Reynolds* did not at all turn upon the right to *preside*, but upon the right of the chairman to *adjourn*. The question was, whether the minister presiding had a right to adjourn the meeting so as to prevent the election of a second churchwarden by the parishioners, he himself having previously nominated the first churchwarden. I have looked into the three reports of that case, which are to be found in Sir *John Strange*, in *Fortescue*, and in the cases during the time of Lord *Hardwicke*. They are, in some degree, different; but, in neither is it stated that the right of the minister to preside made any part of the argument. In all, the sole question was, the chairman's right to *adjourn* the meeting; and it was held, that the question of adjournment should have been decided, as it generally is, by vote, and not by the chairman. It is obvious that this question of adjournment must have assumed exactly the same shape, and have led to exactly the same conclusion, whether the minister had been chairman by election or chairman by office. Any opinion thrown out, in a case like this, upon the right of presiding, must have been a mere obiter dictum upon a point not then requiring decision, nor even arising in argument. In one report, *Cas. temp. Hardw.* Lord *Hardwicke* is made to say, "That the general apprehension is, that the minister has a right to preside, but that he knows of no authority for it." That observation is somewhat different in *Fortescue's Reports*. There, it is said, "Supposing that the minister has a power of presiding, it does not follow that he has a power of adjourning." In *Strange*, it is only said, "As to the vicar, he seems to have no share in the election of the *second* churchwarden, nor to have any right to preside." And, to be sure, if there was any case in which he ought to have retired from the chair, it was at the election of a *second* churchwarden, with which he had nothing at all to do. A doctrine of this sort, how-

1819.

WILSON *against* M'MATH.

ever, high as the source is from whence it flows, yet, being on a point not raised in argument, not important to the decision, belonging, not to the law familiar in that Court, but belonging to another jurisdiction, is not of any very conclusive and binding authority. And yet it is the only one leading, in any degree, to negative the right of the minister against those other considerations which I have already stated.

Whether the question has ever been raised in these Courts is uncertain, from the want of reported cases; but that no decision *negativing* the right has ever taken place, would be no extravagant inference to be drawn from the prevalence of the practice of the minister's presiding, coupled with the general impression of his right to do so. Writers on ecclesiastical matters partake of the same impression; not merely *Burn*, but *Prideaux*, whose work on the duties of churchwardens has always been held, in these Courts, to be of considerable authority. He is express upon the subject. *First*, he mentions the regular mode of calling a vestry, (sect. 55.) "When any such thing is to be proposed to the parishioners, the churchwardens, *with the consent of the minister*, call a meeting of the parish." And, again, in speaking of the rates, (sect. 55.) he says, "They only who pay to the rates should make the rates, &c.; but this must not be understood of the minister, though he be not charged to those rates, because, as having the freehold of the church, he hath a special right in it, and, as minister of it, he hath a special duty upon him to see that it be well and duly repaired, and that rates be made to enable the churchwardens to do it; and, therefore, *in every parish meeting he presides*, for the regulating and directing of this matter." This authority, then, as far as it goes, is direct and express. It is not, indeed, of the same weight as an adjudged case, or a canon, but as the understanding of a learned person, himself filling a judicial situation.

The last authority that I shall mention, however, is of greater weight — the recognition of the legislature. In several parishes, select vestries have been constituted, under special acts of parliament, where, from the extent of the population, the business could not well be conducted by the whole parish. One can see no strong reason, why, in such a select vestry, the minister should be appointed chairman, except upon the ground of his general right, and the propriety of the thing itself. The election of a chairman at a select vestry would take but little time, and would not be likely to be attended with conflict and animosity. And yet, as far as I am aware, it is the constant course of the legislature, in acts for appointing select vestries for the management of the *general* concerns of a parish, to direct that the minister shall preside in such select vestry. Be that as it may in these particular cases, the late act, for the regulation of vestries *generally*, appears to contain so strong a recognition of the right, as almost by necessary implication to declare that it is in the minister; while the subsequent act for creating select vestries, *for a special purpose*, in no degree derogates from the general rule, but tends, as an exception, to prove and support it. The first of these acts, that of the 58th of the King, chap. 69., is entitled an act for the regulation of parish vestries. The first section directs the mode of calling vestries; and

1819.

WILSON *against* M'MATH.

and the second section says, "for the more orderly conduct of vestries be it enacted, that in case the rector or vicar or perpetual curate shall *not be present*, the persons so assembled shall forthwith nominate, by plurality of votes, one of the inhabitants to be chairman." Now this is nearly tantamount to a declaration, or by necessary implication declares, that if the rector, vicar, or perpetual curate *be present*, he shall preside: and the legislature must evidently have considered that by law and usage he was entitled to preside. It is only in case of his absence that the parishioners are directed to choose a chairman; and, consequently, when he is present he is the chairman of course. I can construe the act in no other way. It is true that the parishes of *London* and *Southwark* are excepted out of this act. Now, supposing that exception to apply to every clause of the act, still that would only go the length of providing, that by special custom, any vestry in *London* or *Southwark* had the right of choosing a chairman, notwithstanding the presence of the minister, this act would not deprive them of the right under such special custom; but otherwise, *London* and *Southwark* must be presumed to stand on the same footing, in this respect, as the rest of the kingdom. The act of last session (59 *G.* 3. c. 12.) does not diminish this inference. It is entitled "An act to amend the laws for the relief of the poor." By this act a power is given to parishes to establish select vestries *for the concerns of the poor*, the principal object being to render unnecessary the interference of magistrates on every application for relief; and with this view the parish vestry may elect a certain number of persons, not exceeding twenty-five, and the minister, churchwarden, and overseers, with those elected persons, shall manage *the concerns of the poor*. Now, this is not a select vestry for general parochial purposes, but for those particular concerns. The maintenance of the poor is now, in some places, become so heavy a burthen upon *property*, and so much more a matter of *temporal* than of *spiritual* concern, that in a parish committee, specially appointed for that purpose, where possibly the minister, *as a payer of rates*, may have little or no interest, it may be fitting enough to leave the choice of their chairman to these select persons, which would not be likely to produce any disturbance or conflict: and so the legislature has provided. But this does not derogate from the propriety, or weaken the inference of the former act, that in all *other* vestries held for general parochial purposes, the minister is still to preside.

Upon the whole, I am by no means prepared to negative the right of the minister, supported as it is by usage and propriety, laid down by some writers, and recognised, and thus, in effect, declared by the legislature itself. And, in a case where the minister was in the actual possession of the chair, I think that the defendant, upon the facts stated in the articles, is to be considered, by his interruption, as an unlawful disturber.

The other point is, whether this is a matter of ecclesiastical jurisdiction, to be proceeded against as an ecclesiastical offence. Now, this being the disturbance of a minister, in the exercise of a function belonging to him in his ecclesiastical character, at a meeting of an ecclesiastical

district

1819.

WILSON
against
M'MATH.

district (for a parish is such district), a meeting held for general ecclesiastical purposes, and in an ecclesiastical place, a consecrated place, the church, or vestry of the church, it seems to me that it must be of ecclesiastical jurisdiction and cognisance. I apprehend that such *rights*, and such *places*, and the orderly conduct of such *meetings*, are under the protection and guardianship of the ecclesiastical laws. It has not been pointed out to this Court how any other court can interfere, or how redress can be procured elsewhere. It seems as much an offence of ecclesiastical jurisdiction as the erecting tombstones in a church-yard, or the pulling down tombstones, or breaking a door into a church-yard, or neglecting to repair a chancel, or setting up arms in the church, or forbidding the organ to be played when directed by the minister, or many other matters which are proceeded upon in these Courts, though there is no express canon or statute upon the particular subject. Yet, in all cases of this sort, the proceeding is in the ecclesiastical court, and in the form of articles as for an offence, which mode of proceeding is, in a great degree, like an indictment at common law for a misdemeanour, where no statutory sanction is provided to enforce any thing enjoined, or to restrain any thing prohibited. Some cases, of the sort to which I have alluded, have occurred within my memory in these Courts, and I will here mention two or three of them.

1. *Cade* v. *Newnham*, in the Consistory of *London*, 1786: there, a person was articled against for opening a door into a church-yard. An appearance was given under protest to the jurisdiction, but the protest was over-ruled, and the suit proceeded in this form. 2. *Seger and Hill* v. *The Dean and Chapter of Christ Church*, in the Court of Peculiars, 1787. This was a suit for not repairing the chancel of *Harrow on the-Hill*, and the proceeding was by articles. 3. *Burton and Edwards* v. *Callcott*, in the Consistory, 1780. These were articles for erecting a tombstone in *Kensington* church-yard, and for pulling down another in the same church yard. The Court said, it was "*committing a nuisance in the church yard*; and, as such, was an ecclesiastical offence, and subject to the jurisdiction of the ecclesiastical court." 4. *Maidman* v. *Malpas*, in the Consistory, 1794. These were articles for erecting a monument without the consent of the rector. An appearance was given under protest, which was over-ruled, with costs. 5. *Hutchins* v. *Denziloe*, in the Consistory, *Michaelmas* term, 1791. This case is an authority not wholly inapplicable to the present proceedings, and I shall therefore state it a little more at length. It was a proceeding against the churchwardens by articles; and the offence was thus stated in the citation, "More especially for obstructing and prohibiting by your own pretended power and authority, and declaring your resolution to continue to obstruct and prohibit, the singing or chaunting by the parish clerk and children of the ward and congregation, accompanied by the organ." The churchwardens supposed, that as they paid the organist and managed the children, they were to direct when the organ should play or not play, and when the children should or should not chaunt. The clergyman had ordered the playing and singing at certain parts of the

1819.

WILSON *against* M'MATH.

the service. The churchwardens forbad both, not in the church, but privately, so that there was no brawling or public indecency; but the offence was set forth in the articles, conformably to the citation which I have just stated. Many objections were taken to the admissibility of the articles: among others (as in the present instance), it was said, that no law was specially set forth as having been violated; but the Court said, "Where the *general* law is relied upon it is not necessary to plead it." Again, it was objected, that the fact charged was not of a criminal nature (as is also contended in the present case); but to this the Court replied, "That the right of directing the service was in the minister, and the churchwardens obstructing him in the exercise of that right was an offence, an usurpation of his right, which might be proceeded against in the ecclesiastical court." The preceding are cases within my own recollection in these Courts: the same thing is to be inferred from some reported cases in prohibition. I shall only notice one, that of *Palmer* v. *The Bishop of Exeter*, 1 *Stra.* 776. Sir *Thomas Bury* set up his arms in the church of *St. David's*, *Exeter*. The ordinary promoted a suit in the ecclesiastical court to deface them. A prohibition was moved for, and refused; and Justices *Eyre* and *Fortescue* said, "The ordinary was judge what ornaments were proper, and might order them to be defaced.' Now, all these cases were proceedings by articles. I take it even the last was; and most of them, if not all, for offences under the general principles of ecclesiastical law, and not under any precise canon or statute. The remedy is a very lenient one; for, however high sounding some of the expressions in the articles may be, such as, "touching and concerning your soul's health, and the lawful correction and reformation of your manners and excesses," the only effect of a sentence, as prayed, would be to admonish the party to forbear in future from the like disturbance and interruption, and perhaps to make him pay the costs; but, as to costs, it always lies in the discretion of the Court to mitigate them, as the circumstances of the case may appear justly to require.

Such is the view that I should take of this question, if it fell to my lot to determine it. It is certainly desirable that the point should be settled. It is probable that the opinion of this Court may not be final, and it would be highly satisfactory to my mind that it should be settled by a superior tribunal, either in the way of appeal or of prohibition; but, at present, after mature and careful consideration, forming the best judgment I am able on the subject, I am of opinion, on the grounds already stated, that the articles ought to be admitted. But a rule to shew cause why a prohibition should not issue having been served on this Court, it is my duty not to proceed to admit the articles. I have, however, thought it respectful to state my opinion for the consideration of the court of common law. If they should differ from me, I shall bow to their better judgment with every possible degree of deference and respect.

The admission of the articles was accordingly ordered to stand over. (*a*)

(*a*) The case will be fully reported in Dr. Phillimore's report of cases in the ecclesiastical courts.

Thursday, November 25th.

RANDALL *against* GURNEY.

Where a party in *London* was required to attend an arbitrator at *Exeter*, on a given day, and three days before set off, and went, accompanied by his attorney, to *Clifton*, where his wife resided, and where were certain papers necessary to be produced before the arbitrator, and was occupied for a great part of two days in selecting and arranging the same, and in the afternoon of the second day was arrested: Held, that he was not privileged from arrest under these circumstances, having employed more than a reasonable time for the above purpose, and it not being sworn that he was occupied, during *all the time* he was at *Clifton*, in the object for which he went thither. *Abbott* C.J. dissentiente.

CHITTY obtained a rule nisi for delivering up the bail-bond to be cancelled, on the ground that the defendant had been improperly arrested. It appeared, that a cause, in which the present defendant was a party, had been referred, by an order of the Lord Chancellor, to arbitration. The arbitrator, residing at *Plymouth Dock*, appointed a meeting at *Exeter*, on 20th *September*, 1819, and the defendant, who was sworn to be a material witness, was served with the appointment on the 14th *September*, requiring him to attend and be examined on oath. The defendant accordingly, with his solicitor, left town, and, on *Friday*, *September* 17th, reached *Clifton*, where the defendant's wife then resided. *Clifton* is not the direct road to *Exeter* from *London*, being about twenty miles round; but it was sworn that the books and papers of the defendant were at *Clifton*, some of which were necessary to be produced before the arbitrator, and that it was necessary that he should personally go there for the purpose of unpacking, arranging, and selecting them, and that he was necessarily employed during *a part* of that evening and *nearly* the whole of the following day, in unpacking, separating, selecting, and perusing, in company with his attorney, such of the papers, &c., as in their judgment were necessary to be produced before the arbitrator. About five o'clock in the afternoon of 18th *September*, defendant was arrested, at the suit of the plaintiff at *Clifton*, and before

1819.

RANDALL *against* GURNEY.

before they had finished their examination of the papers. It was also sworn, that the defendant's usual place of residence was at *Prince's Street*, *Pimlico*, whence he had set out, and that his sole purpose in going to *Clifton* was to arrange his papers. In answer to this, the affidavits stated, that defendant had resided at *Clifton* till *August* last, at which period he had absconded, and was, at the time of the arrest, keeping out of the way to avoid his creditors. They also stated that there was no such street as *Prince's Street* in *Pimlico*.

Marryat shewed cause. The defendant left *London* much earlier than was necessary, and the delay at *Clifton* was a mere pretext. It is, indeed, most probable, under the circumstances of the case, that *Clifton*, where he was arrested, was his real place of abode.

Chitty and *Wilde*, in support of the rule. In this case, the defendant was obliged to attend the arbitrator at *Exeter*, and that, too, with his papers, &c. Now as these were at *Clifton*, it was absolutely necessary that he should go there. It is distinctly sworn, that at the time of the arrest, he had not finished his arrangement and selection of the papers, and the Courts are in the habit of giving a fair and liberal construction to this privilege. *Willingham* v. *Matthews*. (*a*) Here the defendant has acted bonâ fide in going to *Clifton*. As to the question whether *Clifton* or *Pimlico* were the usual place of his residence, that would be material had he been arrested in returning from the arbitration, but here he was arrested in going thither.

(*a*) 2 *Marsh.* 59.

ABBOTT

1819.

Randall *against* Gurney.

Abbott C. J. I am of opinion, in the present case, that this rule ought to be made absolute. This defendant, it appears, was duly summoned to attend an arbitrator, and, in his passage from *London* to *Exeter*, the place where the arbitration was held, he went to *Clifton*, to a house where his wife then resided, for the purpose of searching for and examining such papers as, in his judgment, were necessary for the purpose of the arbitration. When this case was at first presented to my mind, I thought it a material point to be ascertained, whether his residence was in *London* or at *Clifton;* but I am now satisfied that it is not so, for he was arrested in his passage to the arbitration at *Exeter;* and the only question, therefore, upon these affidavits, is, whether he was bonâ fide going to the arbitration, or loitering on the road. Now I am not prepared to say, under the circumstances of the case, that as his papers were at *Clifton*, and he was required to produce them, he was absolutely bound to have those papers sent to him, and to take the risk of a loss by the public conveyances; but it is quite clear, that he must either do this or go himself, and select such papers as were necessary. It is to be observed, that he takes his attorney with him, which seems to me to be a mark of bona fides on his part. On the 17th *September* he arrives at *Clifton*, and is occupied, on the following day, in selecting the papers requisite: the 19th would be *Sunday*, and he was required to be at *Exeter* on the *Monday*. Under these circumstances, it does not appear to me, either that the delay on the road was too great, or that the deviation was an unreasonable one. I think, therefore, that the rule ought to be made absolute. But as the

1819.

RANDALL *against* GURNEY.

the rest of the Court are of a different opinion, the rule must be discharged.

BAYLEY J. I am, in the present case, the more satisfied in discharging this rule, because, if I am wrong, it is still competent for the defendant to apply to the Court of Chancery to be relieved from this arrest; for it was under an order of that Court, that the arbitration was held. This reference, it appears, commenced in *March*, at which time the defendant had the papers in his own custody; and, in *August* last, without selecting such as were necessary, he left the whole at *Clifton*, and absconded to *London* to avoid his creditors. He is afterwards informed, that it is necessary for him to be at *Exeter* on the morning of the 20th *September*, at which time his papers were at *Clifton*. Now I do not think that his going to *Clifton* was an unreasonable deviation; but I am of opinion, that he was bound to go as directly as possible, and not to stay longer upon the road than was absolutely necessary for the purpose of selecting his papers. It does appear to me that he intended to remain longer at *Clifton* than he was entitled to do by law. It is not even sworn that his intention was to have set off from *Clifton* on the 18th. By this mode of proceeding he deprives his creditors of the advantage which they would have had incase he had remained in *London* until the proper period of setting off for *Exeter*; for, during that time, they possibly might have arrested him in *London*. I think, therefore, that the affidavits disclose a case of improper delay, and that this rule ought to be discharged.

HOLROYD J. If this party had remained in town till it was absolutely necessary to depart for *Exeter*, he would

1819.

RANDALL *against* GURNEY.

would have stayed at least one, and perhaps two days more, during which time he might have been arrested. Now, if it is lawful for him to take two days, in the next case, probably, three or four will be demanded, and the Court will have great difficulty in drawing any precise line. I agree, therefore, with my Brother *Bayley*, that the present rule ought to be discharged.

BEST J. I am of the same opinion. Although it is very necessary to give protection to witnesses, yet the Court ought to take care that persons do not, under pretence of being witnesses, obtain protection from arrest. I agree that this defendant had a right to go to *Clifton* to get his papers, but he had no right to stay there, as it seems to me he did, for an unreasonable time. It is not stated in his affidavit that he was employed continually during the time he was there in sorting and selecting his papers, and he was bound to do that; for it was his duty to shew, that the whole time was fairly employed for that purpose. There were strong circumstances of suspicion in the case; for he had previously resided at *Clifton*, he had left his wife and papers there, and, according to all appearance, that was his regular home. Now it seems to me to be impossible that it could have taken him so many hours to have selected his papers; and, unless that time was absolutely necessary, he was not privileged from arrest. am of opinion, therefore, that this rule ought to be discharged.

Rule discharged.

1819.

Ex parte PRANKERD.

Friday, November 26th.

The Court, in the exercise of its summary jurisdiction over its officers, have authority to order an attorney, who had refused, on the ground of misconduct, to take back an apprentice, who had run away from his service, to return to the parents of such apprentice a reasonable part of the premium received with him.

PULLER, in last *Trinity* term, obtained a rule nisi calling on Mr. *Fisher*, an attorney of this court, to shew cause why part of the premium received by him with an apprentice should not be returned. It appeared, upon the affidavits, that, for some misconduct, Mr. *Fisher* had refused to receive back his apprentice, who had run away from his service. The premium given was 400*l.*, and the apprentice ran away after being about a year and a half there. *Moore* having then shewed cause against the rule, upon the merits of the case, the Court ordered the matter to be referred to the Master to report how much should be returned. The Master having reported, that 196*l.* ought to be returned, *Moore*, early in this term, moved to discharge the rule for referring it to the Master, on the ground that there was no authority in the Court so to refer it; and he cited *Cuffe* v. *Brown* (a), as an authority in point. And now

Puller shewed cause, and contended, that it had been, in many instances, the practice of this Court to interfere in this mode.

Moore, in support of his rule, contended, that *Cuffe* v. *Brown* had over-ruled this practice. That case was not stronger than the present, yet there the Lord Chief Baron held no part of the premium to be returnable.

(a) 5 *Price*, 303.

1819.

Ex parte PRANKERD.

Here, sufficient reasons appear on the affidavit for the master's not taking back his apprentice. This is an appeal to the equitable jurisdiction of the Court, as was the case in the Exchequer.

ABBOTT C. J. It is extremely convenient that, in cases like the present, the Court should exercise a summary jurisdiction for adjusting disputes between the officers of this court and their clerks. It appears to have been exercised by us and by our predecessors; and I think we ought not to disturb so useful a practice. This is very different from the case cited from the Exchequer. Our jurisdiction here depends on the authority of the Court over its own officers. This rule must, therefore, be discharged.

BAYLEY J. The application on the part of the parents of the apprentice was most reasonable; and I think that there is no doubt that we have jurisdiction in the matter. If so, it is not suggested that the sum ordered by the Master to be returned is not a proper sum.

HOLROYD J. (a) concurred.

Rule discharged.

(a) *Best* J. had left the Court.

HOLME, Clerk, *against* DALBY, Gent., one, &c.

Saturday, November 27th.

Practice. To a bill, filed in vacation, a plea in abatement may be put in after the first four days of th following term

J. *WILLIAMS* shewed cause against a rule for setting aside the judgment signed in this case for irregularity, with costs. The bill was filed in the vacation after last *Trinity* term; and was entitled as of that term. The defendant, within the first four days of the present term, put in a plea in abatement; whereupon the plaintiff signed judgment. It was contended, that this plea was a nullity, being pleaded after a general imparlance. And for this, *Weller* v. *Walker*, 2 *Williams's Saunders*, 2. note 2., was cited.

Per Curiam. The judgment is irregular; for the bill must appear, upon the face of it, to have been filed in vacation, or otherwise it will be erroneous. This case, therefore, does not fall within the general rule above laid down; and the defendant is here entitled to plead in abatement, within the first four days of the present term.

Rule absolute.

Reader and *Chitty* were in support of the rule.

1819.

Monday, November 29th.

The KING *against* FERRAND.

A coroner's duty is judicial, and he can only take an inquest super visum corporis; and an inquest, in which the jury were not sworn by the coroner himself, and super visum corporis, is absolutely void. The Court will not, therefore, after an adjournment by the coroner of such an inquest, grant any mandamus to compel him to proceed in it.

DENMAN, on a former day in this term, obtained a rule nisi for a mandamus to the defendant, who was one of the coroners of the county of *Lancaster*, to proceed with an inquest holden at *Oldham*, on the body of *John Lees*, which had been adjourned from the middle of *October* last, till the 2d day of *December* next. It appeared, on shewing cause, that the jury, on the 8th of *September* last, had been summoned and sworn, super visum corporis, by a clerk of the name of *Battye*, who attended in the coroner's absence; that the inquest was then adjourned for a few days, and that the body was in the mean time buried; that on the coroner's attending in person, the jury were re-sworn, but not super visum corporis, and the coroner proceeded, for many days, to examine witnesses. Whilst the inquest was proceeding, the coroner, without being accompanied by the jury, caused the body to be disinterred, and took a view of it. The Court, upon this, suggested that these proceedings, from the first, were void, and if so, that they could not grant a mandamus to compel them to be proceeded in; and *Best* J. referred to *Hawkins*, *lib.* 2. *c.* 9. *s.* 24. They then called upon

Denman and *Tindal* to support their rule. They contended, that though the clerk had no authority whatever to swear the jury, yet that it was enough, since they had been re-sworn by the coroner himself; and that it was not necessary to swear them super visum

cor-

1819.

The KING
against
FERRAND.

corporis. It is admitted, that both coroner and jury must proceed super visum corporis. But here they have so done; for the jury have been properly sworn, and have seen the body, and the coroner has also had a view of it, and it is not essential that the jury and coroner should see it at the same time. Besides, if there be a reasonable ground for doubt, the Court will not decide it now, but leave it to the coroner to make it the subject of his return to the mandamus.

ABBOTT C. J. If it be perfectly clear that the jury in this case were at first unlawfully assembled, the Court, of course, will not grant a mandamus to proceed with this inquest; for the only result of such a proceeding would be, that the inquest, if proceeded in, would be bad, and the record might be quashed. Now I am of opinion that this proceeding was irregular from its commencement. It is laid down by my Lord *Hale* (*a*), that "when it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner, otherwise, if the body be interred before he come, the township shall be amerced." And it appears, that when this notice is given to the coroner, his duty is to issue a precept to the constable to return a competent number of good and lawful men to appear before him, to make an inquisition. When they appear, they are to be sworn, and charged by the coroner, to enquire, *upon the view of the body*, how the party came by his death. It is said by *Hawkins* (*a*), that the "coroner can take inquisition of death only upon view of the body, and not otherwise. Therefore, if

(*a*) 2 *H. H.* 59, 60. (*b*) 2 *Hawk. c.* 9. *s.* 23.

1819.

The KING against FERRAND.

if the body be interred before he come, he must dig it up, and this he may do lawfully within any convenient time, as within fourteen days." In addition to this, there is the 4 *Edw.* 1. stat. 2., de officio coronatoris, in which it is stated to be the duty of the coroners "quod accedant ad occisos," and afterwards, "si quis autem talium occisus fuerit, in campis vel boscis *et ibi inveniatur*, they are directed to enquire as to the mode by which he came by his death. Now, taking the whole of this together, it appears to me, that there can be no good inquest, unless the coroner and the jurors are both present at the same time, and the oath is administered by the former to the latter super visum corporis. If, indeed, after this inquest had proceeded, upon the arrival of the coroner himself, both he and the jury had gone to view the body, and the jury had then been resworn, it might have been a good inquest. That, however, was not done; and, therefore, I am of opinion that this inquest was wholly void, and that we ought not to grant any mandamus to continue its proceedings.

BAYLEY J. I entertain no doubt upon the present question. Looking at the different authorities which have been cited, and the form of inquisitions which are invariably stated to be taken "upon the view of the body of *A. B.*, now lying dead," this question seems to be placed beyond all doubt. The words of the statute "de officio coronatoris" are very emphatical; "ad occisos accedant vel ad subito mortuos." The coroner, therefore, is to go to the dead body, and the jury are there to be sworn to inquire into the cause of the death. The coroner's duty is partly judicial. It belongs to him,

1819.

The KING against FERRAND.

him, and to him only, to administer the oath to the jury, who cannot, as it seems to me, be properly sworn unless by the coroner and super visum corporis. Now in the present case it appears, that on the 8th of *September* the oath of inquest was administered, and the dead body viewed by the jury. But then the oath was administered by a person wholly without authority. At that time, therefore, the jury were not under a valid obligation to inquire, but were mere strangers to the transaction. And when the jury were sworn afresh by the coroner, upon his arrival, it was not done super visum corporis. Nor, indeed, did they ever view the body after the oath was administered to them by the coroner. For though, on the 24th of *September*, the coroner viewed the body, the jury were not then present. I am, therefore, of opinion that we ought not to make this rule absolute. For we should be doing great injustice if we were to grant a mandamus to the coroner to proceed in an inquiry illegally commenced, illegally proceeded in, and which can have no proper or satisfactory result.

HOLROYD J. I am of the same opinion. If this inquest were to proceed, it would be utterly illegal. For though the statute de officio coronatoris does not expressly say that the coroner shall take his inquest on the view of the dead body, and that an inquest otherwise taken by him shall be void, yet it is clearly laid down by all the books, that a coroner has no manner of power to take an inquisition of death without a view of the body, and that any such inquest taken by him without such view is merely void. Unless it be an inquest super visum corporis it is wholly an extrajudicial proceeding.

1819.

The King *against* Ferrand.

In this case, if the jury had been sworn afresh by the coroner when he viewed the body, and the witnesses had been examined afresh, the inquest would have been legal. Bnt that was not done; and I am of opinion that we ought not to grant a mandamus to continue a proceeding so illegally conducted.

Best J. I am clearly of opinion, that the proceedings before the coroner have been conducted with so much irregularity, that a valid inquest cannot now be found. We ought not to compel by mandamus the coroner to proceed, when we are satisfied that the inquest, when found, must be quashed by the Court into which it will be returned. The jury were summoned by and sworn before the coroner's clerk. Now if the coroner could act by deputy, and this clerk was duly appointed such deputy, (which does not appear,) the inquiry should have been concluded before him. But after this the coroner makes his appearance, and goes on, having re-sworn the jury, but without having had any view. After several more days are consumed in examining witnesses before the coroner, it is suggested to him that he has had no view of the body, and, therefore, that he had no authority to proceed with the inquest. Upon this suggestion he goes to the church, causes the body to be disinterred, just looks at the face of the deceased, and then orders the corpse to be again covered up. This was not a sufficient view of the body to give him authority to proceed. He should have had an opportunity of seeing whether there were any marks of violence, and of ascertaining, from the appearance of the body, what was the occasion of the death of the deceased. At the time that he took the view, the jury

1819.

The KING *against* FERRAND.

jury should have attended him, that they might have had the advantage of his remarks on the appearances that the body exhibited. It has been said, it is sufficient if the jury see the body at one time, and the coroner at another; as well might it be said that the judge might hear the evidence at one time and the jury at another. If, however, this view was sufficient, the coroner should have sworn the jury again, and proceeded de novo. Instead of this he goes on, adding other evidence to what had been taken before the view by himself, and the whole mass was to be summed up to the jury, who were never regularly sworn at all. The passage which I referred to during the argument, from *Hawkins*, shews that an inquest so taken must be quashed. Let it not, however, be understood that it is likely that public justice will be impeded by this accident. The proceeding before a coroner is only one of several in cases of murder: application may still be made to magistrates or grand juries; and I do not lament that an inquiry is stopped, which has been so illegally conducted as the one now before the Court.

Rule discharged. (*a*)

Cross Serjt., and *I. Williams*, were to have shewn cause.

(*a*) In 2 *H. H.* 58. it is said, if a coroner take an inquisition without view of the body, he may take a second inquisition super visum corporis, and that second inquisition is good, for the first was absolutely void. And in p. 66., after stating that the coroner can only take an inquisition super visum corporis, he adds, And, therefore, in ancient times, if a man were hurt in the county of *A.* and died in the county of *B.*, the coroner of *B.* could not take an inquisition of his death, because the stroke was not given in that county, and *the coroner of* A. *could not take the inquisition, because the body was in the county of* B.: but they used to remove the body into the county of *A.*, and then the coroner of *A.* used

1819.

The KING *against* FERRAND.

A. used to take the inquisition. 6 *H.* 7. 10. a.; and the statute referred to by the Court, de officio coronatoris, at the conclusion, after describing the mode of taking the inquest, says, Et hiis inquisitis statim sepeliantur corpora mortuorum vel occisorum. So that anciently it should seem, the body was lying before the jury and coroner during the whole inquest; and in truth, the body is itself part of the evidence to the jury. If, then, they see it before, but not after they are sworn, a material part of the evidence given to them is given when they are not upon oath In corroboration of this view of the subject, it is to be observed, that "if the body be not found, or if it have lain so long before the coroner hath viewed it, that *he can in no way be assisted from the view in taking his inquest*, or if there be danger of infecting people in digging of it up, the inquest ought not to be taken by the coroner, unless he have a special writ or commission for that purpose," *Hawk. lib.* 2. *c.* 9. *s.* 23.; and with respect to a second inquest, the law is thus laid down. So also, he may dig up the body, if the first inquisition be quashed. *Str.* 533. But it must be by order of the King's Bench on motion, *Str.* 167. And the Judges will exercise their discretion, according to the time and circumstances, whether he shall or shall not do it. *Salk.* 377. *Str.* 22. 533. 2 *Mod.* 16.

Monday, November 29th.

The Company of Proprietors of the MARGATE Pier *against* GEORGE HANNAM, Esq., JAMES DYSON, Esq., and two Others.

The acts of a justice of the peace, who has not duly qualified, are not absolutely void; and therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers.

TRESPASS for taking goods: Plea, not guilty. There were two questions in the case: First, whether the plaintiffs were liable to be rated to the poor. The Court decided that they were; and their judgment was grounded on the special provisions of the acts of parliament creating the company, and the peculiar nature of the property. It is, therefore, unnecessary to state that part of the case. The second question was, whether the warrant of distress, signed by the defendants, *Hannam* and *Dyson*, was legal; and that depended upon the question, whether the acts done by *Dyson*, as a justice for the cinque ports, were valid,

he

1819.

The MARGATE Pier Comp. *against* HANNAM.

he having omitted to deliver in a certificate, or to take the oath at the general sessions in the cinque ports, as required by the act of parliament. The facts of the case, and the clauses of the acts of parliament applicable to the question, are fully stated by the Lord Chief Justice, in delivering the judgment of the Court. The case was argued by *Adolphus* for the plaintiff, and *Bolland* for the defendant. For the plaintiff it was urged, that the 51 *G.* 3. *c.* 36. required the justices for the cinque ports to qualify, and that the indemnity act applied only to those who actually did qualify. Here, the defendant, *Dyson*, had not qualified at the time of the trial. This was not like the case of a person who practised as an attorney without being duly admitted. His acts, indeed, were valid; but they were cured, from time to time, by the acts of the parties on the other side. For the defendant, it was urged, that the acts of the defendant, *Dyson*, were not void, although he might be liable to a penalty for having acted without being duly qualified. The 18 *G.* 2. *c.* 20. expressly imposed a penalty on such a person acting as a justice without being qualified. The 51 *G.* 3. *c.* 36. applied to the cinque ports, and was in pari materia. The penalty, though not expressly mentioned in that act, will attach. The words of the 51 *G.* 3. *c.* 36. were not stronger than the 13 *Car.* 2., which makes void the election of any corporate officer who shall not have taken the sacrament within a year. The annual indemnity act relieves such a person from all penalties, and makes his intermediate acts valid. This was like the case of a person practising as an attorney without being duly admitted: he was liable to a penalty, but his acts were not void. The inconvenience that would follow from the construction of the act contended for, on the part of the

1819.

The MARGATE Pier Comp. *against* HANNAM.

the plaintiff, would be very great. Every person acting under the authority of such a magistrate would be guilty of an unlawful act, and resistance to him would be lawful. A constable might even, in such a case, become liable to a charge of murder.

Cur. adv. vult.

ABBOTT C.J. now delivered the judgment of the Court. This was an action of trespass, brought for levying certain poor-rates for the parish of *Saint John the Baptist*, in the *Isle of Thanet*. There had been three rates, all regularly made and published. Two of the three had been duly allowed by two of the justices of the cinque ports. The third was allowed by the defendants, *Hannam* and *Dyson*, acting as such justices: the warrants of distress had been issued by these defendants, and executed by the other two defendants, one of whom was an overseer of the poor, and the other a constable of the parish. Copies of the warrants had been demanded, and notice of the action given. A case was reserved at the trial of the cause, upon two questions: first, Whether the plaintiffs were liable to be rated for the relief of the poor; secondly, whether the acts of the defendant, *Dyson*, as a justice of the peace for the liberties of the cinque ports, in the matter in question, were valid or not. The case was argued before us upon the first question at *Serjeants' Inn Hall*, and we then gave our opinion in the affirmative, viz. that the plaintiffs were liable to be rated for the relief of the poor.

The second question was spoken to at the same time, and afterwards more fully argued here during the present term. It arises in this manner: By an act of the 51st of his present majesty, *c.* 36., his majesty is authorised to issue a commission, to be directed to certain persons

1819.

The MARGATE Pier Comp. *against* HANNAM.

sons to be therein named, constituting them to be justices of the peace within and throughout the liberties of the cinque ports, and investing them with the same power and authority as belongs to any mayor, bailiff, or jurat, to exercise within the liberties of the town whereof he is mayor, bailiff, or jurat, "And from and after," (these are the words of the statute,) "such commision or commisions shall have so issued, all persons and every person named in any such commission or commissions, shall be and they and each of them is and are hereby declared to be justices and a justice of the peace within and throughout the liberties of the cinque ports, and invested with the same power and authority within and throughout the same," as belongs to any mayor, bailiff, or jurat within his port or town. By the third section of this act it is provided and enacted, "That no person or persons to be named in such commission shall be thereby, or by this act, authorized to act as a justice of the peace, unless he shall have such qualification as will authorize him to act for a county, and unless he shall have taken and subscribed the oaths, and delivered in at some general sessions to be holden in some one of the cinque ports, the certificate respectively required to be taken and subscribed and delivered in by persons qualifying themselves to act for counties." The defendant, *Dyson*, had taken the oaths under a writ of dedimus potestatem, but he had omitted to deliver a certificate, or take any oath at any general sessions in any one of the cinque ports; and upon this omission the objection to the validity of his acts as a justice was grounded.

We are of opinion, that, notwithstanding this omission, his acts as a justice, in the matters in question, were valid.

1819.

The MARGATE Pier Comp. *against* HANNAM.

valid. An objection of the same nature may happen to arise in some cases of persons acting as justices for counties at large; and this gives a general importance to the question. By the stat. 18 *G.* 2. *c.* 20., it is enacted, "That no person shall be capable of being a justice, or acting as such for any county, without the qualification by estate therein mentioned, and who shall not take, at some general or quarter sessions, the oath therein prescribed." And by the second section, "Any person who shall act as a justice without having taken the oath, or without being qualified, shall forfeit 100*l.*" It is obvious that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority: a constable who arrests, and a gaoler who receives a felon, will each be a trespasser; resistance to them will be lawful; every thing done by either of them will be unlawful; and a constable, or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction. "Acts of parliament," says Lord *Coke*, "are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged." We think these acts do most reasonably admit of another construction. We think the *restraining* clauses are only prohibitory upon the justice. By the particular act upon which this question has arisen, Mr. *Dyson*, having

1819.

The MARGATE Pier Comp. *against* HANNAM.

having been named in the commission, is declared to be a justice, and invested with power and authority as such. The proper effect, therefore, as it seems to us, of the third section, is only to make it unlawful in him to act as such; but not to make his acts invalid. Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that the acts done should be sustained: sufficient effect is given to the statutes by considering them as penal upon the party acting. No pecuniary penalty, indeed, is imposed by the stat. 51 *G.* 3.; but a justice acting contrary to its prohibitory clause will subject himself, if not to the penalty of the 18 *G.* 2., yet certainly to a prosecution by indictment. For these reasons we think there must be a judgment of nonsuit.

COOPER *against* NIAS.

Monday, November 29th.

Judgment of non pros. must be signed within twelve months from the return of the writ.

A RULE nisi had been obtained, calling upon the defendant to shew cause why the judgment of non-pros, and the subsequent proceedings thereon, should not be set aside for irregularity. The defendant was held to bail on a bill of *Middlesex*, returnable on the 6th *November*, 1818; he surrendered on the 7th *November*, and afterwards, on the 11th *November*, justified bail. There being no further proceedings on the part of

1819.

COOPER *against* NIAS.

of the plaintiff, the defendant signed judgment of non-pros on the 6th *November*, 1819, for want of a declaration. And now

Walford shewed cause, and contended that the defendant had twelve months to sign judgment of non-pros, within twelve months from the day of justifying bail; and he cited *White* v. *White*. (*a*)

Abraham, contrà, relied on *Worley* v. *Lee* (*b*), and *Penny* v. *Harvey*. (*c*)

Per Curiam. The rule is, that if the plaintiff does not declare within a year after the return-day of the writ, he is out of court. The safest course is to reckon the twelve months from the return-day: the time given to put in and perfect bail is merely matter of indulgence.

Rule Absolute, without Costs.

(*a*) *Impey*, *K. B.* 583. (*b*) 2 *T. R.* 112. (*c*) 5 *T. R.* 123.

Monday. *November* 29th.

CARMACK and Another *against* GUNDRY and Others.

Practice.

THIS was an action against the defendants, who were country bankers, upon ninety-eight promissory notes, for a guinea each. The declaration contained a count upon each note, and the money counts. The Court, after hearing *Chitty* for the plaintiff, and *Bayley* for the defendant, ordered it to be re-

1819.

CARMACK *against* GUNDRY

referred to the Master to strike out all the counts on the notes except the first, the defendant undertaking to permit all the other notes to be given in evidence upon the account stated, and not to bring any writ of error. The costs of those counts, and of the application, were to be costs in the cause. (*a*)

(*a*) See *Lane* v. *Smith*, *M.* 56 G.3. 3 *Smith's Reports*, 113.

HUNTER *against* CAMPBELL, M. P.

A member of parliament had given a bond with two sureties, conditioned for the payment of the sum to be recovered in the action, pursuant to 4 *G.* 3. *c.* 33., and, before trial, became bankrupt. The Court refused to order the bond to be cancelled.

A RULE had been obtained in this case, calling upon the plaintiff to shew cause why the bond given in this case by the defendant, and two sureties, pursuant to 4 *G.* 3. *c.* 33., should not be delivered up to be cancelled. In *Trinity* vacation, 1818, the defendant was sued by original, on a bill of exchange, and gave the bond in question, with two sureties, conditioned for payment of the sum that might be recovered with the costs of the action. He afterwards became bankrupt, and, on the 17th *July*, 1819, obtained his certificate. The cause was set down for trial at the sittings in *London*, after *Michaelmas* term, 1818, and being stayed by injunction, had been made a remanet from sittings to sittings ever since. And now

Campbell shewed cause. As the sureties had no power to render, they are in the situation of bail in error, in whose behalf the Court will not interfere, although the principal has become bankrupt, and ob-

1819.

HUNTER *against* CAMPBELL.

tained his certificate. *Southcote* v. *Braithwaite*. (*a*) In the common case of bail to the action, where the recognizance is in the alternative, the bail are supposed to render their principal, who has become bankrupt, and obtained his certificate; and thus to perform the condition of the recognizance.

Scarlett and *Wilde*, contrà, insisted, that unless the plaintiff undertook to impeach the certificate, the validity of which might be tried on an issue, the Court, to avoid circuity, would order the bond to be delivered up to be cancelled. If the certificate be good, it is a bar to the action, and the sureties cannot be liable.

Per Curiam. A bond given under the 4 *G*. 3. *c*. 33. is analogous to bail in error. The sureties will be liable if the plaintiff recover; and it would be most improper to determine, in this summary manner, whether the action was barred by the certificate.

Rule discharged.

(*a*) 1 *T.R.* 624.

1819.

BISHOP *against* BEST.

Several years having elapsed after judgment obtained, the plaintiff brought an action upon the judgment. After judgment had been signed in this action, the defendant sued out a writ of error upon the first judgment: Held, that the plaintiff might, notwithstanding, take out execution on the second judgment.

A RULE nisi had been obtained for setting aside the writ of inquiry and execution, in this case, for irregularity. It appeared, that about twelve years ago, the plaintiff had obtained a judgment against the defendant; and, in *Easter* term, 1818, had brought an action on that judgment. After judgment had been signed in this second action, a writ of error was allowed on the first judgment; after which the proceedings sought to be set aside were had, and the damages were levied.

Scarlett and *F. Pollock* shewed cause, and contended that this writ of error was evidently for delay; and that it was too late to sue out a writ of error, after an action had been brought on the judgment.

Marryatt and *Espinasse*, contrà, relied on *Benwell* v. *Black*. (*a*) There the defendant brought a writ of error; and the plaintiff brought another action on the judgment, and recovered. It was held, that he could not sue out execution on the second judgment till the writ of error was determined.

ABBOTT C. J. In that case, the writ of error was allowed before the second action was brought, and the second action was intended to defeat the writ

(*a*) 3 T. R. 645.

of

1819.

Bishop *against* Best.

of error. Here the writ of error was intended to defeat the action on the judgment, and, being brought so many years after the judgment in the final action was perfected, was evidently for delay; and in case the writ of error succeeds, the defendant will be entitled to have the money levied under the execution returned. The rule must, therefore, be discharged with costs.

Rule discharged.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1820.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Sixtieth Year of the Reign of GEORGE III. and First of GEORGE IV.

SARGENT *against* MORRIS. (a)

Monday, January 24th.

By a bill of lading, the Captain was to deliver the goods for the consignor, and, in his name, to the consignee. At the time of shipment, the consignee had no property in the goods: Held, that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and that, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship.

DECLARATION stated, that the Defendant was the owner of a vessel lying in the river *Guadalquiver*, and bound to *London*; and that the plaintiff, at the special instance and request of the defendant, caused to be shipped on board the vessel certain goods, to be taken care of, and safely and securely conveyed by the defendant within the vessel, under the deck thereof, to *London*, and there to be safely delivered, dry and well conditioned, for the plaintiff; and in consideration

(a) The Judges of this Court sat at *Serjeants' Inn* on the 17th day of *January*, and succeeding days, when this and several of the following cases were argued.

1820.

SARGENT *against* MORRIS.

thereof, and of a certain freight to be paid by plaintiff to defendant, he undertook to take care of and safely convey the said goods and merchandises, within the vessel, and under the deck thereof, and deliver the same as aforesaid. Breach, that the defendant placed and put the goods upon the deck of the vessel, and otherwise conducted himself with great negligence, by reason whereof the goods were greatly damaged. Plea, non-assumpsit. At the trial before *Abbott* C. J., at the *London* sittings after last *Trinity* term, it appeared that the goods were shipped by *Bayo* and Son of *Seville*, and that they were the parties interested in the goods. By the bill of lading, the Captain acknowledged to have received on board the vessel, and under the deck thereof, of *Don Pedro Bayo* and Son, the goods therein mentioned; and it then proceeded in the following words: "I undertake to deliver the same to you, and in your name, according to custom and usage, to Mr. *Sargent* or his assigns, paying freight," &c. The plaintiff, on receiving advice of the shipment, effected an insurance on account of *Bayo*, and advanced the premiums. It was objected, that the action ought to have been brought by *Bayo* and Son, and not by the present plaintiff. The Lord Chief Justice directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

Scarlett and *F. Pollock* now shewed cause. The plaintiff, in this case, had a qualified property in the goods, and that is sufficient to entitle him to maintain this action; for he had paid freight and premiums of insurance. To that extent, therefore, he clearly had a lien, and might

1820.

SARGENT *against* MORRIS.

might maintain trover. There is, in substance, nothing in this bill of lading differing from any other: it is only an expansion of the real contract, in all cases; for the carrier always delivers to the consignee, for and on behalf of the consignor. In *Waring* v. *Cox* (*a*), the plaintiff was not named in the bill of lading, but was an indorsee without any consideration; here, he is named in the bill of lading, and at the time of arrival, clearly had a lien on the goods. For before either they were shipped, or the bill of lading was made out, he had been directed to insure, and had come under an engagement or duty so to do. He, therefore, had the paramount property in the goods; for in all cases of general property and special property, the person having a special property is entitled to precedence. The contract of every carrier or ship-owner is doubtful, and is made either with the consignor or the consignee, according to each particular case; but, generally, it is to be intended that the contract is made with the consignee. If, however, the consignee be merely the agent of the consignor, or a mere trustee, then, indeed, the contract is made with the consignor. Here, the consignee was a trustee, having an interest, and that interest or right paramount to the right of the consignor. Much prejudice and loss may arise to *British* merchants here, if it be held that they are not, under these circumstances, entitled to sue.

ABBOTT C. J. It does not appear to me, that our decision against the present plaintiff is likely to work any prejudice to the interests of commerce. This is an

(*a*) 1 *Campb.* 369.

1820.

Sargent *against* Morris.

action on a special contract, founded on a bill of lading, on the face of which it does not distinctly appear whether the contract made by *Bayo* and Son was made on their own behalf, or as the agents of *Sargent*, who is named in the bill of lading as the person to whom the delivery is to be made. That fact is, however, afterwards ascertained by other circumstances; for it appears by the plaintiff's answer to a bill in Chancery, that the shipment was made on account of *Bayo* and Son, at their risk and for their benefit, and not on the risk or for the benefit of the present plaintiff. It is true, if the goods had been delivered to him, that he would have had a lien to the extent of any advances he had made for freight or insurance on account of his principal; and, if there had been any deviation so as to discharge the underwriters, and the goods had never arrived, he would have been entitled to recover against *Bayo* for such advances. A transfer of the property is, however, very different from a transfer of the contract. It appears to me, that this action, at the suit of the present plaintiff, is not maintainable.

Bayley J. This is an action on a special contract; and the declaration states, that the plaintiff caused to be shipped on board the defendant's vessel, certain goods, to be carried and delivered to the plaintiff, and that he undertook and promised the plaintiff accordingly. The declaration therefore describes the plaintiff as the original shipper, and the original contract as having been made with him. Now I take the rule to be this; if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with

1820.

SARGENT *against* MORRIS.

with whom the contract is made, it is no answer to an action in his name, to say, that he is merely an agent, unless you can also shew, that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring your action, either in the name of the agent or *principal.* In this case, the contract appears, by the terms of the bill of lading, to have been made with the *Spanish* house. Then for whom was it made? why, upon the evidence in the cause, on account of the *Spanish* house. It is, however, urged, that inasmuch as *Sargent* had made certain advances on their account, they were his goods at the time of the shipment. Now, in the first place, there is no evidence to shew, that, *at the time of the shipment*, he had made any advance whatever. At that time, the right of action was vested in the party to whom the goods belonged. What was done subsequently does not affect this point. As to the advance, I take it to have been made in the ordinary way in which an agent makes an advance for his principal, in respect of which he would be entitled to sue his principal, on whose credit the advance was made. If, indeed, the goods had reached his possession, he might have had a lien till he had been repaid; but no lien can take place till the goods come into his possession. The prospect of a lien made in respect of advances subsequent to the shipment, never can satisfy the allegation of the plaintiff, that he had caused the goods to be shipped, and that the defendants contracted with him to deliver; the

1820.

Sargent *against* Morris.

contract, in fact, was not with him, but with *Bayo*. For these reasons, it seems to me, that the contract is not made out in evidence, and that the action cannot be supported.

Best J. (*a*) I am of the same opinion. In the case of *Evans* v. *Marlett* (*b*), this distinction is taken. If goods by bill of lading are consigned to *A.*, *A.* is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special to deliver to *A.* for the use of *B.*, *B.* ought to bring the action. That case is precisely in point. I think that the action here must be brought in the name of *Bayo*, the contracting party. It would be a very different case, if this had been an action of trover against a person who had prevented the plaintiff from having his lien. It is impossible to say that he is one of the original contracting parties in this case, which he must be, in order to entitle him to bring this action.

Rule absolute for entering a nonsuit.

Marryat and *Campbell* were to have argued in support of the rule.

(*a*) *Holroyd* J. absent at the *Old Bailey*.

(*b*) 1 *Ld. Raym.* 271.

1820.

THOMPSON *against* LACY.

Monday, January 24th.

A house of public entertainment in *London*, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in *London*.

TROVER for goods. Plea, not guilty. At the trial before *Abbott* C. J., at the *London* sittings after last *Trinity* term, it appeared the defendant kept a house of public entertainment, called *The Globe Tavern and Coffee House*, in *Fore Street*, *Moorgate*, where he provided lodging and entertainment for travellers and others. No stage coaches or waggons stopped there, nor were there any stables belonging to the house. The plaintiff, in *December*, 1818, having lived before that time in furnished lodgings in *London*, went to the defendant's house and engaged a bed; he continued to reside there for several months, and then left the place. The defendant, in his bill, charged for eighty-three nights' lodging; and claimed to detain the goods mentioned in the declaration, on account of money due to him for lodging and entertainment provided for the plaintiff. Upon these facts, the Lord Chief Justice was of opinion, that the defendant had a lien upon the goods, and the plaintiff was nonsuited, with liberty to move to enter a verdict for nominal damages the plaintiff undertaking, in that case, to re-deliver the goods. A rule nisi having accordingly been obtained in the last term for that purpose,

Marryat and *E. Lawes* now shewed cause. The defendant is substantially an inn-keeper. It is not necessary that every inn should have stables, for there are many country inns frequented by the lower classes, where there are no stables, and the circumstance of the

1820.

THOMPSON *against* LACY.

defendant's house being in *London*, which is more frequently the termination of a journey, makes no difference, for it is as important for the traveller to be furnished with accommodation at the end of his journey, as in his progress. A guest would have the same right to claim entertainment at the defendant's house, as at any country inn, and in *Parkhurst* v. *Foster* (*a*), an inn is said to be a place where all persons have a right to claim to be entertained as guests.

Gurney and *F. Pollock*, contrâ, in support of the rule contended, that the defendant did not keep an inn, and even if he did, that the plaintiff was not, with respect to his residence at his inn, within the rule of the common law, inasmuch as he had previously been continually resident in *London*. In *Calye*'s case (*b*), it is laid down, that common inns are instituted for passengers and wayfaring men; for the *Latin* word for an inn is *diversorium*, because he who lodges there is, quasi divertens se a via. And therefore if a neighbour who is no traveller, at the request of the innholder, lodges there as a friend, and his goods be stolen, &c. he shall not have an action. The defendant's coffee-house is not intended for wayfaring men, and, even if it were, the plaintiff, an inhabitant of *London*, frequenting it, and even sleeping there, is not a wayfaring man within the rule. Besides an inn ought to have the means of entertainment for the horses of travellers, and here there were no stables; and in *London*, houses frequented by stage coaches and waggons are alone termed inns.

(*a*) 1 *Salk.* 387.

(*b*) 8 *Coke*, 683.

ABBOTT

1820.

THOMPSON *against* LACY.

ABBOTT C. J. The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travellers. We should otherwise be obliged to say, that a person who arrives at a house of public entertainment in a post-chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveller, and that the landlord who gave him the accommodation required, would be an innkeeper: and yet that if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice enquiry in each particular case. It seems to me, therefore that it would be better, both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns. By so deciding, the guest will have the protection of the law for the security of his goods, if they are lost or stolen, and the person who keeps the house will also have the benefit of the law, which allows him to retain the goods of his guest to insure the payment of his demand. I am now speaking of a case where the party was in the habit of sleeping in the house. As I cannot, therefore, distinguish a house like that of the defendant, who furnishes every accommodation to all persons

1820.

THOMPSON against LACY.

persons for a night or longer, from a country inn, I think that the nonsuit was right, and that this rule must be discharged.

BAYLEY J. I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travellers, who, in *London*, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does; but he provided lodgings, and that in the way they are provided at inns: for the charge was at so much per night. In the *Six Carpenters'* case (*a*), a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with every thing which he has occasion for whilst upon his way. It has been said, however, that in *London* the character of inn belongs only to those houses of public entertainment frequented by waggons and stage coaches. Now if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a post-chaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged, that to constitute an inn there should be stables annexed to it: if that were so, many inferior houses of entertainment in the coun-

(*a*) 8 *Coke*, 290.

try,

1820.

THOMPSON *against* LACY.

try, frequented by foot travellers, would not come within the description; and the poorer travellers would not have the protection which the law gives to a guest against an innkeeper. I think, therefore, that in point of law this is an inn, and that the defendant is under the obligations to which innkeepers are liable, viz. that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill. This rule must, therefore, be discharged.

BEST J. I am of opinion that the defendant's house, under the circumstances of this case, is to be considered as an inn. The consequence of which is, that he has a lien on the goods of his guests; and, on the other hand, that he is responsible to them for property left in his care. An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. In this case, the defendant does not charge as a mere lodging-house keeper, by the week or month, but for the number of nights. A lodging-house keeper, on the other hand, makes a contract with every man that comes; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price. I think, therefore, this rule should be discharged.

Rule discharged.

1820.

Monday, January 24th.

BATTLEY and Another *against* FAULKNER and Another.

Where *A.*, under a contract to deliver spring wheat had delivered to *B.* winter wheat, and *B.*, having again sold the same as spring wheat had, in consequence, been compelled, after a suit in *Scotland* which lasted many years, to pay damages to the vendee, and afterwards *B.* brought an action of assumpsit against *A.* for his breach of contract, alleging as special damage, the damages so recovered. Held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract, which, in assumpsit, was the gist of the action, having occurred and become known to *B.* more than six years before that period, *A.* might properly plead actio non accrevit infra sex annos.

ASSUMPSIT. The declaration stated, that in consideration that plaintiff would buy of defendants a certain quantity of spring wheat for seed; the defendants undertook, that the same should be spring wheat. Breach, that the wheat was not of that description; but, on the contrary, was, at the time of the sale, winter wheat. It then stated, as special damage, that the plaintiffs had sold the wheat to one *Shepard* as spring wheat, and that he had caused it to be sown as such wheat in the Spring of the year 1810, and that the wheat became and was unproductive, and would not ripen or bring crops to maturity in that year, whereby *Shepard* lost the use of his land. It then stated, that an action was brought by *Shepard* against the plaintiffs, in the Court of Session in *Scotland*, for the damage sustained by him, in consequence of the wheat not being spring wheat, and that he recovered damages and costs. Plea, first, general issue; secondly, that the cause of action did not accrue within six years. At the trial before *Abbott* C. J., at the *London* sittings after last *Trinity* term, it appeared on the statement of plaintiff's counsel, that in the early part of the year 1810, the plaintiffs, who reside in *Scotland*, bought the wheat in question of the defendants, as spring wheat, and sold it as such to one *Shepard*, who having sown his land with it, and having discovered, in the autumn, that it was almost wholly unproductive, gave notice to

the

1820.

BATTLEY *against* FAULKNER.

the plaintiffs, that he considered them responsible to him for the loss of his crop from the lands where it was sown. The plaintiffs communicated this to the defendants; and, after *Shepard* had commenced proceedings in the *Scotch* court against them, in *June*, 1811, gave the defendants notice that he had done so, and was about to assess damages against them. Nothing more passed between the parties till the beginning of the year 1818, when the suit in *Scotland* being then completed, the plaintiffs paid *Shepard* his damages and costs, and commenced the present action against defendants, to recover such damages and costs as special damage, resulting from the breach of the warranty. The Chief Justice, on this statement, which was agreed to on both sides, asked if there was any promise to take the case out of the statute of limitations; and being answered in the negative, nonsuited the plaintiffs. In the last term, *Scarlett* obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had: and now

Marryat and *F. Pollock* shewed cause. By the 21 *Jac.* 1. *c.* 16. *s.* 3., all actions upon the case, other than for slander, shall be commenced and sued within six years next after the cause of such action or suit, and not after. The question, therefore, is, when did the cause of action accrue. Now in assumpsit, the breach of contract is the gist of the action. The cause of action, therefore, accrued absolutely at the time when the contract was broken, or at least when the breach of the contract became known to the plaintiff. In *Saunders* v. *Edwards* (*a*), the distinction is taken, that where words

(*a*) *Sid.* 95.

are

1820.

BATTLEY *against* FAULKNER.

are actionable in themselves, the damages are recoverable from the time of speaking the words, and not from the time of the loss sustained; and, therefore, that not guilty within two years, is a good bar to the action; but where the words are not actionable of themselves, but become so by reason of special damage, not guilty within two years is not a good plea; and this case is put, that if a woman be called a whore, and thereby, seven years after, loses her marriage, she shall have her action, and not guilty within two years is no answer; for it is the loss and not the speaking alone which is the cause of action. In *Fitter* v. *Veal* (*a*), the plaintiff having, in a former action, recovered damages for a battery, afterwards, in consequence of the same battery, lost part of his skull, and brought another action for that injury. It was held, however, that having once recovered for the battery, he could not afterwards bring another action for further injury, arising from the same battery: that is, therefore, an authority to shew, that subsequent damage creates no new cause of action, and *Vansandau* v. *Corsbie* (*b*) is to the same effect. Here the cause of action was created by the breach of the contract, and not by the damage which subsequently accrued from it. In *The South Sea Company* v. *Wymondsell* (*c*), Lord Chancellor *King* held, that although fraud would take the case out of the statute of limitations, yet it would be a good bar if the fraud were discovered more than six years before the bill filed.

(*a*) 12 *Mod.* 513.
(*b*) *Ante*, 13.
(*c*) 3 *P. W.* 143.

Scarlett

1820.

BATTLEY *against* FAULKNER.

Scarlett and *Tindal*, contrà. In actions on the case, the happening of the damage is the cause of action. Assumpsit is a species of action on the case, and is so considered by Lord C. Baron *Comyns*, in his Digest. There is no solid distinction between actions on the case founded upon a promise, or upon a wrong. The action on the case itself was introduced into the law by the statute *Westminster* the second (*a*) and at first was confined to cases of malfeazance only. It was, however, found so convenient a remedy, that an attempt was soon made to extend it to cases of non-performance of promises. The first action of assumpsit was in the 2 *Hen.* 4. It was an action against a carpenter, who had undertaken to build a house within a certain time, but had not done it, and the action was held not to be maintainable, although it was admitted, that if the work had been begun, and had afterwards been stopped through negligence, it might be otherwise, on the distinction between malfeazances, and cases of negligence. At its first introduction, not guilty was a good plea to an action of assumpsit. This being, therefore, substantially an action on the case, it is founded on the consequential damage. But secondly, this is substantially an action for the fraud, and the right of the plaintiff is not to be varied in consequence of his having declared in assumpsit, *Weall* v. *King* (*b*), *Roberts* v. *Read* (*c*), is an authority to shew, that where an act of parliament directs an action to be brought within three months after the fact committed, it may be brought within three months from the time when the damage accrued,

(*a*) *Reeve's Hist. E. Law*, 89. (*b*) 12 *East*, 452.
(*c*) 16 *East*, 250.

1820.

Battley *against* Faulkner.

although the act occasioning the damage, happened more than three months before the commencement of the action.

Abbott C. J. It appears to me that the nonsuit in this case was right. The cause of action which the plaintiff has brought, arose out of the delivery to him of wheat of a different kind from that which the defendant had contracted to deliver. The wheat delivered was not only useless, but worse than useless, because it did not grow, and consequently the profit which might have arisen from the land on which it was sown was lost. Now, when did these matters occur? They occurred in 1810 and 1811, and undoubtedly it was then that the cause of action accrued. The statute of limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of. It seems to me, that this case falls within the very words of the statute, and that the cause of action existed more than six years before the action was brought. It is true that the particular damage sustained was not all known till a considerable time afterwards. It would be extremely dangerous to enquire in every particular case, the precise period of time when the damage first came to the knowledge of the plaintiff, and in many instances it would deprive the party of the benefit which the legislature intended to confer upon him. The plaintiff in this case, might, as soon as he knew of the defective quality of the wheat, or at any time within the six years have sued out a writ, and have thus obtained an efficient remedy against the defendant, it is by his own negligence

gence that he is deprived of his remedy, and he has no right to complain.

1820.

BATTLEY *against* FAULKNER.

BAYLEY J. The statute says that you shall bring your action within six years next after the cause of action and not after. This is an action for a breach of contract, and the cause of action arises at the time when the contract is broken. Since that time, certain damages have resulted from that breach of contract. The breach of the contract, however, is the gist of the action, and the special damage is stated merely as a measure of the damages resulting from that cause of action. If the plaintiff had failed in proving the special damage in this case, it would not have been a ground of nonsuit. One of the objects of the statute of limitations was, that actions should be brought to trial at a period of time when the defendant could be prepared with his witnesses to meet the charge, which would not be the case if the action might be postponed to an indefinite period. Now see what the consequences might be if the party was bound only to sue out his writ at the time when the measure of damages was ascertained, and not when the contract was broken. Suppose, for example, the present plaintiff had sold the wheat to *Shepard*, and he had sold it again to *A.*, and *A.* to *B.*, and *B.* to *C.*; then suppose *C.* to wait for five years, and then to bring an action against *B.* and recover, and that at the end of five years more *B.* should bring an action against *A.* and that *A.*, at the end of another five years brought an action against *Shepard*, and that *Shepard* took five years more before he brought his action against the present plaintiff. Then, according to the argument, each party having acquired a new cause of

1820.

BATTLEY *against* FAULKNER.

action, the present plaintiff might, twenty-five years after the original transaction, bring an action against the present defendant. Now it is by putting an extreme case, that you often try the propriety of a rule. If the plaintiff in this case had released the defendant from the breaches of contract, that release would have been a bar to the present action for the special damage subsequently accruing; and this shews that the foundation of the action is the breach of contract. It was, therefore, from the period when the contract was broken, that the cause of action accrued; and as that happened more than six years before the commencement of the present action, I think the nonsuit was right.

HOLROYD J. In this case, the breach of the contract is the very gist of the action ; and the reason why special damage is stated, is because mere collateral damage must be stated in the declaration, in order to entitle the plaintiff to give it in evidence, lest otherwise the defendant might be taken by surprise. It is true, that assumpsit is a species of action on the case; but it differs materially from an action on the case founded on a wrong. In the latter form of action the plea is not guilty; in the other, it is non-assumpsit. Assumpsit will lie against executors; but case does not; nor can assumpsit be joined with counts founded upon a tort. It does not, therefore, follow, that because assumpsit is an action on the case, and that special damage is stated, that the breach of contract is not the gist of the action. It is said, however, that although the action might be maintained upon the breach of promise, yet that the damage subsequently sustained, forms a substantive ground of action: but it cannot be so considered in this form of action.

Accord-

1820.

BATTLEY against FAULKNER.

According to that argument, the action ought to have been brought for the tort. Supposing, however, that the pleadings had been differently framed, I do not know that the party would be benefited, for it seems to me, in this case, that the damage has originated substantially out of a breach of contract, and, therefore, the plaintiff could not have gained any advantage by changing the form of remedy. It is sufficient, however, to say, that this action is particularly founded on the breach of contract, and that being so, the nonsuit was right.

BEST J. It appears to me that the terms of the statute are extremely clear and unambiguous. It says, that the action must be brought within six years after the cause of action, and not after. The only question, therefore, is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendant failed to perform that which he agreed to do. Now he contracted to sell wheat of a particular quality, and the wheat is, in fact, of a different quality. The cause of action was therefore complete, and the statute began to operate from the time of the delivery of the wheat. It is said, however, that the plaintiff, might have adopted a different form of action, and proceeded for the fraud. If, however, the action had been founded on fraud, it seems to me that the fraud was complete when the wheat was forwarded to *Scotland*. In this case the plaintiff might have issued his writ for the purpose of keeping the action alive. The object of the statute of limitations was to prevent persons from being charged with claims, who, in consequence of the lapse of time,

1820.

BATTLEY *against* FAULKNER.

might have no means of proving a discharge. If a party is served with a writ, he knows it is necessary to preserve the evidence; and therefore he is on his guard. If, however, there be no legal proceedings against him, he imagines that there is no cause of complaint. If a long period of time elapse, his witnesses may die, and he may be unable to give an answer to the claim. It seems to me much better that parties should be put to bring their action as soon as they can; and, upon the whole, I think that this nonsuit was right.

Rule discharged.

Monday, January 24th.

BREWSTER *against* SEWELL.

Where a loss had been settled upon a policy of insurance against fire, in the year 1813, and upon a trial in 1819, the plaintiff, in an action for libel, charging him with having made fraudulent claims upon the insurance company, with respect to such loss, called their agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterward, when the plaintiff made a larger insurance with the company; that upon the loss having been settled, the old policy became an useless paper; that he did not know what had become of it, but he believed he had returned it to the plaintiff. The clerk to the plaintiff's attorney then proved, that within a few days of the trial, he went to plaintiff's house to search for the policy, when the plaintiff showed every drawer where he usually kept his papers; that he examined such [illegible] every other place where he thought it likely to find such a paper, without finding it: Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy.

ACTION for a libel. Declaration stated, that the plaintiff had effected a policy of insurance against fire, with the *Essex* Insurance Society, upon which a loss happened, and then set forth the libel, which charged the plaintiff with fraud, in certain claims made by him in respect of such loss by fire. Pleas not guilty, and a justification. At the trial before *Garrow* Baron, the plaintiff not being able to produce the original policy, gave the following evidence, with a view to entitle him to give secondary evidence of its contents. An agent of the company stated, that in 1813, there was a fire in the plaintiff's premises, and that on the day following the fire, the policy was placed in his hands; that he had it in his possession at the time of the loss, and

also

1820.

BREWSTER *against* SEWELL.

also afterwards, when the plaintiff came to make another larger insurance, and that upon that insurance being made, in witness's opinion the original policy became a useless paper, and that he did not know what became of it afterwards. He had searched for it, but could not find it. He rather thought he must have returned it to the plaintiff, but he was not certain. The clerk to the plaintiff's attorney was then called, who stated, that on a few days before the trial, he went to the plaintiff's house for the purpose of searching for the policy in question; that the plaintiff himself shewed him the drawers where his papers were, and that the witness minutely examined the drawers, and could not find the policy; they opened every drawer in the place, and went into an old lumber room at the top of the house, examined some piles of papers there, and searched the iron chest; they did not, however, search the out-houses, barns, hay-loft, or granary. *Garrow* Baron was of opinion, at the trial, that this was not sufficient evidence of the destruction of the policy, so as to let in secondary evidence, and he nonsuited the plaintiff. A rule nisi having been obtained in *Michaelmas* term last, to set aside this nonsuit,

Marryatt and *Jessopp* now shewed cause. There was no evidence in this case to shew that the policy had been destroyed. The inference from the evidence rather was, that the policy was returned to the plaintiff, and, therefore, that he still had the power to produce it. To say that the evidence given at the trial is sufficient to let in secondary evidence, would be to make the plaintiff his own witness in his own cause, and that without subjecting him to the obligation of an oath or to cross-examination: and any plaintiff who discovered that a

1820.

BREWSTER *against* SEWELL.

written instrument declared upon, varied from his declaration, might, to avoid a nonsuit, cause a recent examination of certain papers under his own direction, not to find, but to avoid finding the thing required. This is not like the case of an examination for title deeds, in the known depository of such instruments, the muniment room of men of landed property; nor like the case of a confidential solicitor, agent, or clerk, or member of a family, who pledges himself for the knowledge of the place, where his principal, in the course of transacting his concerns, was in the habit of depositing instruments or writings of the nature required. *Rex* v. *Castleton* (a), is an authority to shew, that such evidence would not be sufficient in case of an indenture of apprenticeship, to let in parol evidence of its contents. So also, in the case of an expired lease, it is necessary to shew that it is destroyed; and in *Rex* v. *Johnson* (b), where secondary evidence was admitted to prove the contents of the paper, it was shewn, that the paper was not only useless, but the witness believed it to be lost or destroyed; and in *Kensington* v. *Inglis* (c), similar evidence was given. Besides, in this case, the plaintiff ought, at all events, to have called the subscribing witness to the policy.

Gurney, *Nolan*, and *Walford*, contrà, were stopped by the Court.

ABBOTT C. J. All evidence is to be considered with regard to the matter with respect to which it is produced. Now it appears to be a very different thing,

(a) 6 *T. R.* 236. (b) 7 *East*, 66. (c) 8 *East*, 273.

whether

1820.

Brewster *against* Sewell.

whether the subject of inquiry be a useless paper, which may reasonably be supposed to be lost, or whether it be an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned. This is the case of a policy of insurance, by which a company undertook to indemnify the plaintiff against losses by fire. A fire took place and a loss was paid. That having taken place, the original policy became mere waste paper. There was no reason to suppose, that the policy could, at any future time, be called for, to answer any reasonable purpose whatever. In that respect, such a document differs most essentially from an indenture of apprenticeship. The latter instrument may be useful, after the apprenticeship is expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement; any of these reasons may induce a person to take care of such an instrument. So, also, there are reasons to induce a person to take care of an expired lease, for such an instrument may shew distinctly the terms upon which the estate was held. There is no rational ground, however, upon which any person could expect that such an instrument as the present should have been wanted. This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient. Now here the clerk of the insurance company leaves it extremely doubtful on his testimony, whether the paper which was last seen in his hands, had been retained by him or returned to the plaintiff. If it were retained by him, he has proved that he searched for, but could not find it. If it were not retained by him, it was pro-

 bably

1820.

Brewster against Sewell.

bably delivered back to the plaintiff. Nobody supposed that it was wanted until the counsel suggested that it might be required at the trial. The clerk of the plaintiff's attorney then went to the plaintiff's house, where the plaintiff himself shewed him all his drawers and places where a person might reasonably be supposed to keep his papers; the clerk examines them all, searches a pile of papers, opens the iron chest, and, in short, he looks not only in every place which the plaintiff pointed out, but in every place which he thought, on his view of the premises, was likely to contain a paper of this description. Upon such evidence, applied to such a paper, it does appear to me to be reasonable to presume that it was lost, and that the legal presumption is, that it is absolutely lost. If the case had not stopped there; if the plaintiff had produced a copy, or had given parol evidence of its contents, it might then have been time to inquire, whether there was a subscribing witness. The party was stopped before any secondary evidence was given on the subject: it seems to me, therefore, that this rule should be made absolute.

Bayley J. I am of the same opinion. There is a great distinction between useful and useless papers. The presumption of law is, that a man will keep all those papers which are valuable to himself, and which may, with any degree of probability, be of any future use to him. The presumption on the contrary is, that a man will not keep those papers which have entirely discharged their duty, and which are never likely to be required for any purpose whatever. Under the circumstances of this case, and considering the lapse of time which has occurred, I should have thought that much

less

1820.

BREWSTER *against* SEWELL.

less evidence would have been sufficient to entitle the party to give the secondary evidence. The policy in question had discharged its duty in 1813, and a new policy was then granted. At that time the policy in question was removed from the plaintiff's house, where he kept his valuable papers. Now for what purpose should he afterwards replace it there. The presumption and the probability would be, that it could not be of any future use, and that it would merely be an incumbrance to the place in which it was put. I think that the presumption of law would be, that after a reasonable lapse of time, such a paper would have ceased to have an existence; because, in the exercise of ordinary prudence, a man would not keep a document of that kind, but would dsstroy it. It seems to me, therefore, that there is abundant ground in this case for letting in the secondary evidence. An indenture of apprenticeship is one of the muniments of the party, relating to certain rights belonging to him, which may be varied, according as he may prove that he had an indenture or not; and the probability would be, that as there is a reason why it should be taken care of, it will not be destroyed. So, also as to expired leases, it is often of great importance to the lessor, to produce those instruments, to shew the terms of those leases, and other circumstances connected with the estate; they are part of the landlord's muniments. The lessee also may at some distance of time, be called upon to account for the muniments of his farm. I am not aware of any case where a landlord has been precluded from giving parol evidence of the contents of a lease, when he has shewn that he has had his muniments destroyed by accident, and had applied to the lessee,

1820.

Brewster *against* Sewell.

lessee, to know if he had got any counterpart. I do not know that in such a case it must be shewn, in order to give secondary evidence, that the lessee has searched in the place where he usually kept his muniments. I am, therefore, of opinion, that the rule for a new trial should be made absolute.

Holroyd J. I am also of opinion, in this case, that the secondary evidence ought to have been received. It appears that the document had for some time become wholly useless. The contents of the paper, at least as far as particular terms of the policy were concerned, were perfectly immaterial. The only question was, whether it was a policy upon the property of a particular individual. Now the reason why the law requires the original instrument to be produced, is this, that other evidence is not so satisfactory, where the original document is in the possession of the party, and where it is in his power to produce it or to get it produced, provided he gives notice. In either of these cases, if he does not produce it, or take the necesary steps to obtain its production, but resorts to other evidence, the fair presumption is, that the original document would not answer his purpose, and that it would differ from the secondary evidence which he gives with respect to the instrument itself. The law, in such a case, requires the original itself to be produced. Although it be the general rule of law, that the best evidence is to be produced, yet that rule is not to be taken literally, for, with respect to evidence of a person holding an office, such as that of constable, it is not necessary to produce the actual appointment. It is sufficient to shew, that he is in the exercise of the office. So also,

1820.

BREWSTER *against* SEWELL.

also, in the case of rectors and vicars sued for non-residence, it is sufficient to shew, that they have done some of the acts which such persons are required to do. It seems to me, therefore, that this being a useless instrument, where the particular terms of the instrument are immaterial, the party cannot be presumed to have any improper purpose in resorting to secondary evidence. Then, as to the search for the paper, I think, for the reasons stated by the Court, that sufficient was done to entitle the party to give secondary evidence.

BEST J. I am of the same opinion. It is very difficult to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle the party to give secondary evidence of its contents. That must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it has a strong interest which would induce him to withhold it, a very strict examination would properly be required: but if a paper be utterly useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence of its contents. It seems to me, however, in this case, that sufficient diligence was used. Here the plaintiff brings an action for a libel, charging him with having defrauded the insurance office. The material fact to be inquired into is, has he cheated the insurance office? and in order to show that he has not, it is necessary, framed as the pleadings are, to produce the policy. The plaintiff could have no possible interest in keeping it back, because one of the defendants being

1820.

BREWSTER *against* SEWELL.

being one of the committee of the society with whom the insurance was effected, he had the means of knowing every thing about it, and of bringing forward a copy of the original. I think, therefore, that there was abundant proof of search to let in the secondary evidence; and therefore this rule must be made absolute.

Rule absolute.

Monday, January 24th.

ILOTT *against* WILKES.

A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading the latent wire communicating with the gun, and thereby letting it off.

DECLARATION stated that defendant was possessed of a wood called *Chrishall Wood*, in the county of *Essex*, over and along a certain part of which there was a right of way for all the king's subjects on foot, in the day and at other times; and that defendant, before the committing of the grievances, had set a certain spring-gun, charged with gunpowder and leaden shot, in a certain part of said wood and premises, near those parts over which the right of way extended, with a certain wire communicating with the lock and other parts of the said spring-gun, by the treading on or touching of which wire, the said gun could be let off and fired, with intent to lacerate, wound, and injure persons coming into that part of the wood where the gun was set and placed; and that the wire was laid across in the day time as well as the night time; and that it was the duty of the defendant not to have permitted the said gun to remain so loaded and charged, and with the said wire communicating with the lock and other parts thereof, without causing notice to be given to persons passing along the said wood

1820.

ILOTT *against* WILKES.

wood in the day time, of the said gun being so situate and placed, and of the direction and place where the said wire so communicating with the lock and other parts thereof, was placed, in order to prevent persons through ignorance treading on or touching the wire so communicating with the lock, and thereby letting off the gun and being injured by the discharge; that defendant wilfully, negligently, and with the intent aforesaid, permitted the said gun to remain in a part of the wood, loaded, &c., with the wire communicating, &c., without giving notice to persons passing along the wood in the day time, of the direction or places in which the wire communicating with the lock was placed or laid, by means whereof plaintiff, being in the said part of the wood in the day time, and not having any knowledge, notice, or warning of the place or direction where the wire communicating, &c., was laid or placed, trod upon and touched the wire communicating with the lock, and by reason thereof the gun went off and discharged several shot, and plaintiff was thereby injured. The second and third counts did not differ substantially from the first. The fourth count charged, that defendant suffered the spring-guns to remain loaded in the wood, &c., without taking *due and proper means* to prevent persons in the wood from being injured thereby, by reason whereof plaintiff was injured. The fifth count stated, that the defendant knowingly, wrongfully, and unlawfully, permitted a spring-gun, loaded, &c., to remain so loaded, &c., by means whereof plaintiff, not knowing, and not being able to perceive where the wire was placed, in the day time unavoidably trod upon the wire, by which the gun was fired, &c. The sixth count charged the defend-

1820.

ILOTT *against* WILKES.

defendant with having unlawfully placed the guns in the wood, without any *sufficient or legal notice* to his Majesty's subjects; and that plaintiff, being a liege subject, and not being able to perceive where the gun or spring-wire was, did, unknowingly, for want of sufficient legal notice, tread upon the wire, &c. The seventh count stated, that defendant, wrongfully and maliciously, placed in certain lands a spring-gun, loaded, &c.; and that plaintiff, in walking and passing along the said land, unknowingly trod upon the wire, &c. Plea, not guilty. At the trial before *Garrow* Baron, at the last Summer assizes for the county of *Essex*, the following facts were given in evidence: The defendant was the owner of *Chrishall Wood*, consisting of fifty or sixty acres; and by his order, nine or ten spring-guns were set there. Several boards were affixed, containing notice to the public that such instruments were so placed. There formerly had been a path on the outside of the wood, but it had not been used for some years. The plaintiff, on the occasion in question, accompanied by another person, went out in the day time for the purpose of gathering nuts, and proposed to his companion to enter *Chrishall Wood*. The latter, however, refused, unless the plaintiff would go first; and he then told plaintiff that spring-guns were set there. They both, however, entered the wood, and the plaintiff received the injury which was the subject of the action, in consequence of treading on the wire communicating with the spring-gun. Upon these facts, the learned Judge, considering that this involved the same question which was under the consideration of the Court of Common Pleas, in *Dean* v. *Clayton*, directed the jury to find a verdict

1820.

ILOTT *against* WILKES.

verdict for the plaintiff, and reserved to the defendant liberty to move to enter a nonsuit. The jury assessed the damages at 50*l.*; and found, that at the time of the injury, there was not any footpath near the place in question; that the plaintiff was not in the exercise of any right of path, but was gathering nuts; and that he had knowledge and notice that spring-guns were placed in the wood. And a rule nisi for entering a nonsuit having been obtained in last *Michaelmas* term,

Adolphus, *Dowling*, and *Chitty*, shewed cause. In this case, the defendant, if present, would not have been justified in shooting a mere trespasser: he could only use as much force as was necessary to prevent the trespass, or its continuance. If that be so, the maxim of law applies here, that a man shall not do indirectly that which he cannot do directly. The circumstance of the plaintiff's having notice that the guns were fixed in this wood, can make no difference; for, if the defendant had himself stood at the entrance with a loaded gun, and given notice to a trespasser that he would shoot at him if he entered, such an act would not therefore be justifiable. If, indeed, the notice had pointed out the particular spot where the wire communicating with the gun was placed, and the trespasser had gone to that spot where the danger was inevitable, and trod upon the wire, the firing off the gun would have been his own act, and not the act of the person who placed it there; but where a party enters upon a space of sixty acres, knowing only that some spring-guns are there placed, he does so with a well-grounded expectation that he may avoid a partial danger. The firing off the gun, in such a case, by the accidental

tread-

1820.

ILOTT *against* WILKES.

treading on a latent wire, cannot be considered as his act. This forms a distinction between this case and that of a trespasser climbing a wall, on the top of which are fixed spikes or broken glass. There he knows that he must, in every part, meet with the instrument of mischief. In this case, it is possible that he may meet with it, but it is probable that he may not. The immediate cause of the mischief here is latent. The case of a ferocious dog kept for the protection of property, is distinguishable on this ground, that the dog is capable of moving to any part of the premises, and therefore may be considered as present in every part; and therefore, the danger, in that case, is inevitable. In *Jay* v. *Whitfield*, tried before *Richards* C.B., at the *Warwick* Summer assizes, 1817, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered 120*l*. damages, and no attempt was afterwards made to set aside that verdict. In *Dean* v. *Clayton* (*a*), the Court of Common Pleas were equally divided upon the general question. Upon that it is sufficient to say, that the law has assigned certain specific remedies for the protection of property; and even if they were insufficient, it is not competent to an individual to have recourse to a contrivance, the effect of which may be to inflict wounds, or even death, upon a mere trespasser.

ABBOTT C. J. We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no

(*a*) 2 *Marsh*. 577. 1 *B. Moore*, 203.

rea-

reason to apprehend personal danger, may or may not maintain an action. That question has been the subject of much discussion in the Court of Common Pleas, and great difference of opinion has prevailed in the minds of the learned judges, whose attention was there called to it. Nor are we called upon to pronounce any opinion as to the inhumanity of the practice, which in this case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection. I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass. In this case it is found by the jury that the plaintiff actually knew that spring-guns were set in this wood. Now, sitting in a court of law, we cannot say that an action may be maintained against the defendant for doing an act like the one in question, if it be not in itself unlawful. The jury have found that the plaintiff (before he entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there; to him, therefore, they ceased to be latent engines of mischief; and the degree of injury sustained

 cannot

1820.

ILOTT *against* WILKES.

cannot vary the case in principle. The Court, therefore, cannot hold that this action is maintainable, unless they are also prepared to say, that any trespasser who should hurt himself by coming in contact, in the dark, with spikes or broken glass stuck on a wall, which at that time would be invisible, could maintain an action against the owners, in a case where it appeared that he had had a previous opportunity of observing in broad day-light that such means of mischief were placed upon the wall. But in that case I believe no lawyer will argue that an action could be maintained. I am not able to distinguish this case from that which I have put. Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.

BAYLEY J. Nothing that falls from me shall have a tendency to encourage the practice, which, to a certain extent, has prevailed, of setting these engines for the protection of property, the consequence of which sometimes has been to cause great bodily injury to persons entirely ignorant of the existence of engines of this description. Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury which the plaintiff has sustained, and that he will render to the party as much compensation as he ought, without compromising the question of law, and without admitting

it

1820.

ILOTT *against* WILKES.

it as a matter of obligation upon him, that he is bound to make a compensation for the injury through the medium of a suit at law. This is a case in which the plaintiff had notice that there were spring-guns in the wood. The declaration states, that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say "There are spring-guns in this wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law, volenti non fit injuria, applies; for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring-guns. Notwithstanding that caution, he says, "I will go into the wood, and I will run the risk of all consequences." Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no right to enter the wood; and, in so doing, he became a trespasser and a wrong-doer. It has been said that these guns were wrongfully and unlawfully placed in the wood. Now let us enquire whether it was unlawful or not; one of the tests of trying that question is this: Does the law punish a man

 for

1820.

Ilott *against* Wilkes.

for the mere act of putting these instruments upon his own premises? Is he indictable for it? For that is the criterion by which we are to judge of the legality of this act. If it could be made out as an abstract position of law, that the defendant is liable to be indicted for setting spring-guns in his premises, then, perhaps, whether he puts up notices or not, he might not have any defence; for, notwithstanding the notices, he would be liable for the consequences of an unlawful act. But if it cannot be shown that it is an unlawful act to set these spring-guns, it seems to me that the defendant was at liberty to do it. At the same time he would be liable for a civil injury produced from want of caution on his part to guard against such an injury; for although it may be lawful to put these instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger. This declaration is founded upon the ground, that such is the law upon the subject; for the first count states, that the defendant set the guns there without giving notice of their place and direction. Then another count states, that the guns were set there without giving proper notice where the wires which communicated with the guns were placed. Another count states, that they were placed without sufficient and proper notice to all his majesty's subjects. The declaration, therefore, assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take due

1820.

ILOTT *against* WILKES.

due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce. Where a man, however, is actually apprised before he enters that the guns are there, he cannot afterwards complain that there has not been a proper and sufficient notice given. The case of a man keeping on his own premises a furious dog, or bull, is to a certain degree analogous to this. Suppose such a person were to give a notice that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act. So, also, if a trespasser enters into the yard of another, over the entrance to which notice is given, that there is a furious dog loose, and that it is dangerous for any person to enter in without one of the servants or the owner. If the wrong-doer, having read that notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard, and is worried by the dog, (which in such a case would be a mere engine without discretion,) it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred. If, indeed, the master had been upon the spot at the time, and had seen the dog running towards the man, it would have been his duty to have done all in his power to prevent the animal from worrying him, and if he had not so done, the party injured might have had a right of action. I am, therefore, of opinion, on the ground of notice only, that this action is not maintainable.

 HOLROYD

1820.

Ilott *against* Wilkes.

Holroyd J. I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring-guns were placed in the wood in question. I do not consider it necessary that he should have notice of the precise spot in which the spring-guns were placed. It is sufficient, in the present case, that he had notice generally that they were placed in the ground in question. The mere act of placing spring-guns in a man's own ground is not of itself unlawful. It is not an indictable offence, nor will it subject a party to an action, unless some injurious consequences result from it. If any such consequences result, it may perhaps form the subject of an action. Without giving any decided opinion upon that point, but assuming, for the present, that that would be so, it seems to me that a party having express notice that the spring-guns were placed in a particular ground, and entering upon that place as a trespasser, stands in a very different situation; for if the placing of the spring-guns be not of itself an unlawful act, and only becomes so in respect of the consequences which result from it, the party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, volenti non fit injuria; for as he knew that the spring-guns were placed there, he can have no right of action for an injury which resulted from his own act alone. The only doubt which I have entertained during the course of the argument arises out of that maxim of law, that a man cannot do that indirectly which he cannot do directly. I am now, however, satisfied, that that principle has no application to the present case, where the plaintiff had express notice that the spring-guns were placed on the premises into which he wrongfully entered; for in that

case

case the act of firing off the gun, which was the cause of the injury, was his act, and not the act of the person who placed the gun there. If, indeed, a party who had no notice, had gone into the grounds, although he would be a trespasser, the act of firing off the gun, by treading accidentally on the wires, would not, in consequence of those wires being latent, be considered his own act; but he would be a mere instrument of producing that which resulted from a prior act done by another. If one person makes use of another, who is a mere instrument, to do any act, the thing done is the act, not of him who is merely the instrument, but of the person who uses him as such instrument. Thus, if a man induces a madman to inflict wounds upon the person of another from which death ensues, in point of law, that is not considered the act of the madman, but the act of the person inciting him. The madman is considered a mere instrument, and the other person, though not present at the time of the act done, is indictable for murder as a principal (although, generally speaking, to make a person a principal in murder he must be present at the time); the reason of which is, that the act done is considered as the act of the person who causes it, and he is considered as virtually present at the time of doing it, and the madman as a mere instrument in his hands. So it is in a case where one person secretly mixes poison with food, for the purpose of the poison being ignorantly taken in the food by another. Now, in the present case, in order to make the firing off of this gun the act of the person who placed it there, we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff; and we must consider the latter as a mere instrument, and not as an

 actor;

1820.

ILOTT against WILKES.

actor; but, in my opinion, the plaintiff in this case was not an instrument, but an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here, he entered the wood with full notice that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there. If, indeed, the defendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act; but in the present case he was absent, and had not the means of averting the mischief; and, therefore, the maxim of law, that a man cannot do that indirectly which he cannot do directly, is not applicable to the present case. Indeed, that maxim would equally apply to a case where a person kept a ferocious bull in his grounds, where other persons were used to resort. (a) In such a case, if there was no notice, and a trespasser was to enter and be gored, an action would lie for the injury; but if public notice were given, and it could be shewn that the trespaser knew that such a dangerous animal was there, and with that knowledge was hardy enough to run the risk, it is perfectly clear that he could support no action. I am, therefore, of opinion that this action is not maintainable, on the ground that the damage sustained has been produced by the plaintiff's own wilful act.

(a) See *Brock* v. *Copeland*. 1 *Esp. Ni. Pri. Rep.* 204.

BEST

1820.

ILOTT *against* WILKES.

BEST J. The act of the plaintiff could only occasion mere nominal damage to the wood of the defendant. The injury that the plaintiff's trespass has brought upon himself is extremely severe. In such a case, one cannot, without pain, decide against the action. But we must not allow our feelings to induce us to lose sight of the principles which are essential to the rights of property. The prevention of intrusion upon property is one of these rights, and every proprietor is allowed to use the force that is *absolutely* necessary to vindicate it. If he uses more force than is *absolutely* necessary, he renders himself responsible for all the consequences of the excess. Thus, if a man comes on my land, I cannot lay hands on him to remove him, until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him, but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in aid other assistance. I am speaking of out-door property, and of cases in which no felony is to be apprehended. It is evident, also, that this doctrine is only applicable to trespasses committed in the presence of the owner of the property trespassed on. When the owner and his servants are absent at the time of the trespass, it can only be repelled by the terror of spring-guns, or other instruments of the same kind. There is, in such cases, no possibility of proportioning the resisting force to the obstinacy and violence of the trespasser, as the owner of the close may and is required to do where he is present. There is no distinction between the mode of defence of one species of out-door property and another (except in cases where the taking or breaking into the property amounts to felony.) If

the

1820.

ILOTT *against* WILKES.

the owner of woods cannot set spring-guns in his woods, the owner of an orchard, or of a field with potatoes or turnips, or any other crop usually the object of plunder, cannot set them in such field. How then are these kinds of property to be protected, at a distance from the residence of the owner, in the night, and in the absence of his servants? It has been said, that the law has provided remedies for any injuries to such things by action. But the offender must be detected before he can be subjected to an action, and the expense of continual watching for this purpose would often exceed the value of the property to be protected. If we look at the subject in this point of view, we may find, amongst poor tenants, who are prevented from paying their rents by the plunder of their crops, men who are more objects of our compassion, than the wanton trespasser, who brings on himself the injury which he suffers. If an owner of a close cannot set spring-guns, he cannot put glass bottles or spikes on the top of a wall, or even have a savage dog, to prevent persons from entering his yard. It has been said in argument, that you may see the glass bottles or spikes; and it is admitted, that if the exact spot where these guns are set, was pointed out to the trespasser, he could not maintain any action for the injury he received from one of them. As to seeing the glass bottles or spikes, that must depend on the circumstance whether it be light or dark at the time of the trespass. But what difference does it make, whether the trespasser be told the gun is set in such a spot, or that there are guns in different parts of such a field, if he has no right to go on any part of that field? It is absurd to say you may set the guns, provided you tell the

1820.

ILOTT *against* WILKES.

the trespasser exactly where they are set, because then the setting them could answer no purpose. My Brother *Bayley* has illustrated this case, by the question which he asked, namely, can you indict a man for putting spring-guns in his inclosed field? I think the question, put by Lord C. J. *Gibbs*, in the case in the Common Pleas, a still better illustration, viz. can you justify entering into inclosed lands, to take away guns so set? If both these questions must be answered in the negative, it cannot be unlawful to set spring-guns in an inclosed field, at a distance from any road, giving such notice that they are set, as to render it, in the highest degree, probable, that all persons in the neighbourhood must know that they are so set. Humanity requires that the fullest notice possible should be given, and the law of *England* will not sanction what is inconsistent with humanity. It has been said, in argument, that it is a principle of law, that you cannot do, indirectly, what you are not permitted to do directly. This principle is not applicable to the case. You cannot shoot a man that comes on your land, because you may turn him off by means less hurtful to him; and, therefore, if you saw him walking in your field, and were to invite him to proceed on his walk, knowing that he must tread on a wire, and so shoot himself with a spring-gun, you would be liable to all the consequences that would follow. The invitation to him to pursue his walk is doing, indirectly, what, by drawing the trigger of a gun with your own hand, is done directly. But the case is just the reverse; if, instead of inviting him to walk on your land, you tell him to keep off, and warn him of what will follow if he does not. It is also said, that it is a maxim of law, that you must so use

your

1820.

Ilott *against* Wilkes.

your own property as not to injure another's. This maxim I admit, but I deny its application to the case of a man who comes to trespass on my property. It applies only to cases where a man has only a transient property, such as in the air or water, that passes over his land, and which he must not corrupt by nuisance; or where a man has a qualified property, as in land near another's ancient windows, or in land over which another has a right of way. In the first case, he must do nothing on his land to stop the light of the windows, or in the second, to obstruct the way. This case has been argued, as if it appeared in it, that the guns were set to preserve game, but that is not so; they were set to prevent trespasses on the lands of the defendant. Without, however, saying in whom the property of game is vested, I say, that a man has a right to keep persons off his lands, in order to preserve the game. Much money is expended in the protection of game, and it would be hard, if, in one night, when the keepers are absent, a gang of poachers might destroy what has been kept at so much cost. If you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country. Their poor neighbours will thus lose their protection and kind offices; and the government, the support that it derives from an independent, enlightened, and unpaid magistracy.

Rule absolute.

Marryatt then stated, that the defendant waved all claim to costs.

1820.

HOWE *against* PALMER.

Monday, January 24th.

Where a vendee verbally agreed, at a public market, with the agent of the vendor to purchase twelve bushels of tares (then in vendor's possession, constituting part of a larger quantity in bulk), to remain in vendor's possession till called for, and the agent, on his return home, measured the twelve bushels, and set them apart for the vendor: Held, that this did not amount to an acceptance by, the latter, so as to take the case out of the 17th section of the statute of frauds.

DECLARATION stated that defendant bargained for and bought of the plaintiff, and that plaintiff sold to defendant 12 bushels of winter tares at the price of 1*l.* per bushel, to be delivered by plaintiff to the defendant within a reasonable time, and to be paid for on delivery, and in consideration thereof, and that plaintiff had promised to deliver same, defendant promised to accept the same, &c. Breach, that defendant would not accept. Plea, general issue. At the trial before *Garrow* B. at the last assizes for the county of *Essex*. It appeared that plaintiff, the grower of the tares, resided at *Pergo* in *Essex*, and that in *August*, 1818, he sent his nephew, who managed his farm, to *Romford* market with a sample. The defendant there verbally agreed to buy 12 bushels at 1*l.* per bushel, and to send to the plaintiff's farm at *Pergo* to fetch them away. The sample was offered him, but he declined taking it, saying that he had seen the tares on plaintiff's premises, and that he had no immediate use for them, and therefore requested that they might remain there until he wanted to sow them, which was agreed to. The plaintiff's nephew, on his return from *Romford*, measured out the 12 bushels and set them apart in the plaintiff's granary, and orders were given that they should be delivered to defendant when he should call for them. It was objected at the trial, that there being no note or memorandum in writing, this contract was void by the statute of frauds. The learned judge reserved the point, and the plaintiff had a verdict with liberty

to

1820.

HOWE *against* PALMER.

to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose in last *Michaelmas* term,

Marryat and *Walford* now shewed cause. There was a sufficient delivery to take this case out of the statute of frauds. By the express terms of the contract the tares were to remain in the possession of the seller till the buyer sent for them, and they were separated from the bulk and measured out immediately after the sale by the nephew of the plaintiff. Inasmuch as the plaintiff had seen the tares in bulk, and had bought only 12 bushels, and directed that they should remain in the plaintiff's possession till called for, he must be taken to have given an implied authority to the plaintiff's nephew as his agent to measure out the quantity, and that act of measuring must be considered as an act done by the buyer: and consequently as an acceptance on his part. There was, therefore, a constructive delivery, and the only delivery that could be made by the seller consistently with the terms of his contract. In *Elmore* v. *Stone* (*a*), the purchaser of a horse from a horse-dealer desired him to keep the horse at livery for him, and the horse-dealer removed the horse from his sale stable to another, and that was holden a sufficient delivery to take the case out of the statute, and *Heath* J. then stated that if goods ordered at a shop to be left till called for are weighed out or measured, that is a sufficient delivery. In *Chaplin* v. *Rogers* (*b*), which was a sale of a stack of hay on the spot where the stack

(*a*) 1 *Taunt.* 458. (*b*) 1 *East*, 192.

stood,

1820.

HOWE against PALMER.

stood, there was no actual delivery, but the fact of the vendee having sold part of it to another, by whom, though against the vendee's approbation, it was taken away, was held sufficient to warrant the jury in finding a delivery to and acceptance by the vendee.

Lawes Serjt., contrà, was stopped by the Court.

ABBOTT C. J. The statute of frauds is one of the most important and beneficial statutes to be found in the books. One of its objects was to require written testimony or memorials of contracts such as are required by the laws of most countries. The words of the 17th section are these, "no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorised." Now in this case there has been no note in writing of the contract, and there has been nothing given in earnest or in part payment. Unless, therefore, the buyer has accepted and received part of the goods so sold, this case is within the statute, and no action can be brought on the verbal contract entered into between the parties. Then the question is, has the buyer accepted? Now, if he had once accepted, he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample. But it is clear that he had a right to make any objection at the time when they

were

1820.

Howe *against* Palmer.

were tendered to him for acceptance. If the defendant in this case had gone to the plaintiff's granary to demand the tares, and, upon inspection, had discovered that they did not correspond with the sample, it is impossible to say that he might not then have made the objection. And if so, it is clear that there was no previous acceptance on his part. I, therefore, think that this case comes within the very words of this statute, to which we ought to give full effect, and not to suffer its beneficial provisions to be evaded by subtle distinctions.

Bayley J. I am of the same opinion. I think the safest rule to follow is to adhere closely to the words of the statute. The two cases cited are distinguishable from this; for, in *Chaplin* v. *Rogers*, the jury thought that there was sufficient evidence to draw the conclusion of an actual acceptance, inasmuch as the vendee had dealt with the hay as his own. In *Elmore* v. *Stone*, the buyer directed expense to be incurred: and the directing of that expense was considered evidence of an acceptance on his part. That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. There is this distinction between that case and this, that there an expense was incurred on account and by the direction of the buyer: here there is none. But I must say, however, that I doubt the authority of that decision. This case is clearly within the statute, and the rule must be made absolute.

Holroyd J. I am of the same opinion. In this case there has been no actual receipt of any part of the goods sold within the usual meaning of the

1820.

HOWE *against* PALMER.

the term, and I think that what has been done ought not to be considered, in point of law, as an acceptance. For, supposing that it was made part of the contract in this case, that *the seller* should set apart and measure the thing sold; that would not make the act of measuring amount to a virtual acceptance, or receipt of the goods by the buyer. For if they were measured by the seller only, that would not prevent the buyer, when he inspected them, from objecting either to the quantum or quality of the goods. And unless it would amount to that, it does not appear to me to be an actual acceptance or receipt of the goods. And supposing it not to be part of the contract, but that directions were given at the time by the buyer to the seller's agent to measure the goods for him, that would not make him the agent of the buyer so far as to make that act amount to an acceptance on his part. For an authority to measure the goods would not give him authority as agent to accept. The buyer might afterwards object that the articles did not correspond with the terms of the contract. This case differs from that of *Elmore* v. *Stone*; for there it was agreed between the parties that the horse should be transferred from the sale to the livery-stable, and an expense was incurred by the purchaser for the keep, which could not be unless the horse was supposed to have come into his possession. I think, therefore, that as there was no acceptance by the buyer, this case falls within the words of the statute, and that the rule must be made absolute.

BEST J. I am of the same opinion. So far from being disposed to restrain the provisions of this statute,

 I should

1820.

HOWE *against* PALMER.

I should be inclined to extend them. In this case, I think that the plaintiff is prevented from recovering, both by the spirit and the very letter of the act. The spirit, I take to be this, that a contract shall not be binding, unless there be some act done which directly shews an acceptance on his part. Now there is no such act done in the present case, and I think, in all cases, it is better to adhere to the words of the statute, unless we plainly see that the words used do not express the meaning of the legislature. Here, it appears to me that they do plainly express the meaning of the legislature, and that this case is within the very words of the statute. The rule, therefore, must be made absolute.

Rule absolute for entering a nonsuit. (*a*)

(*a*) See *Astey* v. *Emery*, 4 *M.* & *S.* 262. *Alexander* v. *Comber*, 1 *H. Bl.* 20. And *Selw. N. P. Stat. of Frauds.*

Monday, January 24th.

DOE, on the Demise of BINGHAM and Others, *against* CARTWRIGHT.

Where, upon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should, on a future day, bring a surety and sign the agreement, neither of which he ever did: Held, that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms of the letting, therefore, might be proved by parol evidence.

THIS was an ejectment tried before *Richardson* J., at the last assizes for the county of *Worcester*. The bailiff proved, that on *Lady-day*, 1818, he agreed that the land in question should be let to the defendant, and that he should sign an agreement with a surety. A memorandum of agreement was drawn up: the terms were read over to the defendant, and he

assent-

1820.

Doe *against* Cartwright.

assented to them. However, he never signed the agreement, or brought any surety. A notice to quit was served before *Midsummer-day*, 1818, to quit at the *Lady-day* following. It was objected, that the terms of the tenancy, the time at which it was to commence and end, ought to be proved by the written memorandum, drawn up by the witness, and assented to by the defendant. The learned Judge was of that opinion, and nonsuited the plaintiff; but reserved liberty to move to enter a verdict. A rule nisi having been obtained for that purpose in last *Michaelmas* term,

W. E. Taunton now shewed cause, and cited *Doe* v. *Morris* (a), and contended, that the written memorandum was the best evidence of the terms of the holding.

Abbott C. J. I think, that in this case, there never existed any written agreement between the parties. The paper referred to at the trial would not become an agreement, till the defendant had brought a surety and executed it. It contained a mere proposal; and, upon the evidence, it appears to have been an unaccepted proposal. The defendant might have been turned out of the premises without any notice to quit; and there could, therefore, be no necessity for producing this memorandum.

Rule absolute.

Puller and *Campbell* were in support of the rule.

(a) 12 *East*, 237.

1820.

Monday, January 24th.

The fact of a cause being in the written list at Nisi Prius, is notice to the attorney that it may be tried at any time in the course of the day; and, therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court granted a new trial only on payment of costs.

FOURDRINIER *against* BRADBURY.

THIS cause was tried as an undefended cause, on the last day of the *London* sittings after *Trinity* term. It appeared upon the affidavits, that the cause had been entered as a cause ready for trial for several days, in the lists put up on the outside of the Court. On the day of the trial, the special jury causes having been disposed of, this was taken (out of its course) as an undefended cause. The defendant's attorney swore, that thirty causes then stood before it in the paper, and, that he always meant to defend the cause; that he had delivered a brief to counsel; and that, on the morning in question, he was present at the sitting of the Court, and finding several special jury causes appointed, and so many common jury causes, which, in their regular order, must have been tried before this, he went away, and returned again at two o'clock, when he found that this cause had been tried.

Gurney and *F. Pollock* contended, that there should be a new trial, upon payment of costs only; inasmuch as the cause had been entered for trial for so many days, in the written paper fixed on the outside of the Court, and that was notice to the defendant's attorney that it might be tried on any one of those days.

D. F. Jones, contrà. The defendant had not given the plaintiff any reason to believe that he did not mean to defend the cause; and it ought not, therefore, to

have

1820.

FOURDRINIER *against* BRADBURY.

have been taken out of its regular order. If the modern practice of posting up lists for the day had never been introduced, it could not have been contended that the defendant was bound to be ready before the Court reached the cause in its regular order. The meaning of that list was merely to give notice that such causes may be tried on that day, and to release from attendance persons engaged in causes not contained in that list.

ABBOTT C. J. The circumstance of the cause being in the list of the day, is sufficient notice that it may be tried in the course of the day, at any time, or in any order that circumstances might render most convenient. It is not expressly stated when the brief was delivered to counsel, or when the subpœna was issued; and it is consistent with the affidavit that both might have been done after the cause was actually tried. As it is not sworn at what time the brief was delivered to counsel, and as the defendant was bound to be ready at any time in the day on which the cause might have been called on, a new trial can only be granted upon the terms of paying the costs of the former trial.

Rule absolute, on payment of costs.

1820.

Monday, January 24th.

Sarah Parton *against* Joseph Williams, John Phipps, Benjamin Gough, and Richard Cooper.

A constable acting under a warrant commanding him to take the goods of *A.*, takes the goods of B., believing them to belong to *A.*: Held, that he was entitled to the protection of the stat. 24 *G.*2. *c.*44. *s.* 8., and that an action against him must be brought within six calendar months.

TRESPASS for taking plaintiff's goods and chattels: Plea, not guilty. At the trial before *Richardson* J., at the last *Salop* assizes, the material question of fact was, whether the property seized, which was the stock of a farm at *Little Wenlock*, belonged to the plaintiff, who was the widow of a former lessee, or to *William Parton*, her eldest son. The jury, after much contradictory evidence, found a verdict for the plaintiff. It appeared that *William Parton*, having served the office of overseer, was 139*l.* in arrear, upon the balance of accounts. The two first-named defendants, *Williams* and *Phipps*, were the succeeding overseers. The goods in question were seized in *September*, 1816, under a warrant of distress issued by two justices. The defendant *Gough* was constable of *Little Wenlock*, and the defendant *Cooper* acted in aid of the other three. It was objected at the trial, that the action could not be supported: first, because it had not been brought within six calendar months after the act committed; and secondly, because there had not been any previous demand of a copy of the warrant. The learned Judge reserved these points; and in last *Michaelmas* term, a rule nisi for entering a nonsuit was obtained on the former ground only, the Court being clearly of opinion, that the constable, not having acted in obedience to the warrant, which directed him to take

take the goods of *William Parton* only, the magistrate could not be responsible, and therefore there was no necessity for demanding a copy of the warrant.

Jervis, *W. E. Taunton*, and *Puller*, now shewed cause. This case is not within the 24 *G.* 2. *c.* 44. *s.* 8.; for the constable, here, was not acting in obedience to the warrant of any magistrate. By section 6. of that statute, no action is to be brought against any justice, constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made of the perusal or copy of the warrant, &c.; and it then directs, that if any action shall afterwards be brought against such constable, without making the justice a defendant, the constable, upon producing the warrant at the trial, shall be entitled to a verdict, notwithstanding the defect of jurisdiction in the justice; and that, if the action be brought jointly against the justice and the constable, then, on proof of the warrant, the jury shall find for the constable, notwithstanding the defect of jurisdiction. The 8th section then enacts, that no action shall be brought against any justice of the peace for any thing done in the execution of his office; or against any constable, headborough, or other officer or person *acting as aforesaid*, unless commenced within six calendar months after the act committed. Now, the words "acting as aforesaid," refer to the words in the former section, that is, "acting in obedience to the warrant of a magistrate;" and those words must be considered as incorporated in the 8th section. It

1820.

Parton *against* Williams.

is clear, in this case, that the defendants did not act in obedience to the warrant of any magistrate. They are, consequently, not within the meaning of the 8th section; and the action is well brought after a lapse of six months. *Money* v. *Leach* (*a*), *Bell* v. *Oakley* (*b*), and *Milton* v. *Green* (*c*), are authorities to shew that constables and other officers are not entitled to the protection of the statute, unless they act in obedience to the warrant of a magistrate. It is true, that in those cases, the question arose upon the 6th section of the statute; but that can make no difference, for the 8th section was intended only to limit the time of bringing actions against officers acting under the circumstances mentioned in the 6th section. In *Postlethwaite* v. *Gibson* (*d*), the question arose upon the 8th section; and it was held, that a constable acting without any warrant did not fall within it. Lord *Kenyon* expressly says, that the statute applied to cases only where there has been a warrant granted by a justice of the peace, and the constable has acted under it.

Pearson and *Campbell*, contrà, were stopped by the Court.

Abbott C. J. The legislature manifestly had very different objects in view in the 6th and 8th sections of the statute upon which the present question arises. By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences, if the magistrate acted without authority. One object, therefore, of the legislature was to relieve the officer from that inconvenience, and to provide

(*a*) 3 *Burr.* 1742.
(*b*) 2 *M. & S.* 259.
(*c*) 5 *East*, 233.
(*d*) 3 *Esp.* 226.

that

1820.

PARTON *against* WILLIAMS.

that if he acted in obedience to the warrant of the magistrate, he should be protected. That was the object of the 6th section, which makes it necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. And it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. And in that case the statute gives him an absolute protection at whatever time the suit may be brought against him. To give him any further protection, when he has so acted, does appear to me to be wholly useless. For I cannot understand why a limitation of time is to be imposed upon any action which the legislature has declared not to be maintainable at all. The 8th section must, therefore, have a very different object in view. It enacts "that no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person, acting as aforesaid, unless within six calendar months after the act committed." The justice, therefore, is protected absolutely, unless the action be brought within that period of time; he has the benefit of that statutable limitation for whatever he may do in the execution of his office, although he may do something not authorised by law. This provision, therefore, is evidently intended for the benefit of persons who intend to act right, but by mistake

act

1820.

PARTON *against* WILLIAMS.

act wrong. The section then proceeds to state, "or against any constable, headborough, or other officer or person, *acting as aforesaid.*" And it has been argued that these latter words imply that the officer must be acting in obedience to the warrant to be entitled to the protection. But I am of opinion that they are to be taken as equivalent to those words of the 6th section, "acting by his order and in his aid." In which case they are coupled with the antecedent word "person" alone. I have already assigned the reasons which induce me to think that this provision cannot be confined to cases within the protection of the 6th section. It may, perhaps, be too much to say that it will apply in all cases where the officer may have acted in what he may have supposed to have been the due execution of his duty. It is, however, unnecessary to decide that point here. Nor is it necessary to pronounce any opinion upon the case of *Postlethwaite* v. *Gibson*, where Lord *Kenyon* thought that unless the officer had a warrant, he was not protected by the 8th section. If it were necessary to determine whether a constable, who without a warrant acts in the execution of his office, and in the discharge of his ordinary duty, be entitled to the protection of this statute, I should wish for further time to consider of it. But in *Postlethwaite* v. *Gibson* the constable was not acting in the execution of his ordinary duty; for it is no part of that duty to arrest a man for a felony, upon the order of a private individual. Any person who is not a constable may equally do it; but both do it at their peril. If it turn out that the party arrested has committed a felony, then they are justified. Here, however, the constable had a warrant, directing him to take the goods of *William Parton.* He went to the house

house where he really supposed those goods were to be found, and it occupied a jury a very considerable time to decide whether he was mistaken or not; he meant, therefore, to obey the warrant; and, as far as he was concerned, he was acting bona fide in obedience to it. It afterwards, however, turned out that the goods belonged to the plaintiff; and, therefore, he was not obeying the warrant of the justice so as to make the justice responsible. As I consider, however, that the 8th section was intended to give a benefit in addition to that given by the 6th section, it appears to me that this case falls within it. And I think, also, that the officer, as far as regards himself, and as far as regards the law which protected him, may be considered as having acted bona fide in obedience to the warrant which he had received. This action ought, therefore, to have been brought within the period of six months. And the rule for entering a nonsuit must be made absolute.

BAYLEY J. When a constable is acting bona fide, and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a magistrate, I am of opinion that he is entitled to the protection of the 8th section of the statute. The 6th and 8th sections contain provisions of a very different kind. The 8th section was intended to give a protection to the constable, which he was not entitled to by the 6th; and the Court, therefore, are authorised to lay out of their consideration the cases of *Money* v. *Leach*, and *Milton* v. *Green*. The 6th section is shortly this: if the act done be in obedience to the warrant, it is identified with that of the justice, and he alone shall be responsible for it. If a

copy

1820.

PARTON *against* WILLIAMS.

copy of the warrant is given, the justice may be made either a sole defendant or a co-defendant; but the party can only recover against the justice. That section must of necessity, therefore, be confined to that description of cases in which the constable acts strictly within the limits of the authority communicated to him by the magistrate; in which case, if the action is maintainable at all, it is maintainable against the justice. If an officer, therefore, confines himself within the limits of the warrant, he has an effectual protection under the 6th section. There could then be no reason for providing that an action, in which the defendant is not liable at all, should be brought within a limited time. The 8th section was intended to give a protection to the justice, and also to the constable and officers where they or any of them have acted beyond the extent of their duty; and it provides that all actions shall be brought within six months, in order that the matter shall be tried promptly after the transaction has occurred, and when the circumstances are fresh in the recollection of witnesses. The words of that section are, "that no action shall be brought against any justice of the peace for any thing done in the execution of his office." Now similar words are used in the first section of the act, which provides "that no writ shall be sued out against a justice for any thing done by him in the execution of his office, unless notice in writing be given." That section has been held to extend to cases where the justice has honestly and bona fide supposed that he was acting in the execution of his office, but has in fact exceeded his authority. I remember a case where an action was brought against a magistrate who had seized a horse and cart, on the ground

1820.

PARTON *against* WILLIAMS.

ground that the driver was riding on the shafts in the king's highway. It turned out, however, that the cart was standing still at the time he was on the shafts; and the Court were of opinion that he could not be considered as riding on the shafts within the meaning of the act of parliament. An action was then brought against the magistrate, but no previous notice was given, and the Court were of opinion that as the magistrate bona fide believed that he was in the execution of his duty, he was within the protection of the first section; and *Weller* v. *Toke* (a) is an authority to the same effect. Inasmuch, therefore, as the same words used in the former part of this act of parliament have been held to give to a magistrate who really believed that he was acting in the execution of his duty, but in fact was acting illegally, the protection intended by the legislature, they must have the same meaning in this section. And if the justice be protected, the legislature must have intended to give equal protection to the constable and officers: for it is but just that where any injury is said to be committed by a person upon whom the law casts a burdensome office, that he should be called upon to answer for it within a reasonable time. In *Postlethwaite* v. *Gibson* the opinion intimated by Lord *Kenyon* does not go to an extent materially to benefit the plaintiff in this case. All that Lord *Kenyon* could be understood to have said is this, that inasmuch as the defendant had not a warrant, and as he was not acting on his own view, he was not acting in his character of a constable; and, therefore, was not entitled to the protection of the 8th section of the act. That

(a) 9 *East*, 364.

1820.

PARTON *against* WILLIAMS.

also was a mere nisi prius decision, and the plaintiff was ultimately nonsuited; so that there was no opportunity of bringing the question before the Court. For these reasons, it appears to me that the officer is entitled to the protection of this section of the statute, provided he acts bona fide in his character of officer, and under a belief that he is discharging the duty with which he is invested; and I, therefore, think that this rule must be made absolute.

HOLROYD J. The words of the 8th section ought not, as it appears to me, to receive the construction which has rightly been given to the 6th section; because there are words in the section upon which that confined construction depends which are not to be found in the 8th. The words of the latter section are general with respect to all actions brought against constables, headboroughs, other officers, and persons acting as aforesaid; that is to say, persons acting in their aid: for that is the construction which I give to those words. The actions, therefore, are not confined to actions for things done in obedience to a warrant; for the words do not specify for what they shall be brought, but only that no action shall be brought against the constable, unless commenced within six calendar months. That part of the clause, indeed, which relates to actions against justices, does specify for what the action shall be brought, viz. for any thing done by them in the execution of their office; but it does not go on to say that the act done by the constable must be an act done by him in the execution of his office, or in obedience to a warrant. It is true that the words used may be narrowed by the general intent of the statute.

But,

1820.

PARTON *against* WILLIAMS.

But, unless that general intent be quite manifest, we cannot construe them as if the words "in obedience to the warrant," &c. had been inserted. Now, considering the 6th section with reference to the law as it stood previously to the passing of this act, it is clear that it could not be the intention of the legislature to confine the protection of the 8th to those cases only where the officer acted strictly in obedience to his warrant. At common law, public officers were bound to execute a magistrate's warrant, provided it was within the magistrate's jurisdiction, and he had authority to grant it in the form in which it was granted. Nice questions, however, sometimes arose upon the validity of the warrants, and upon the particular form of words in which they were framed. When the magistrate had no authority to grant a warrant in the particular form in which it was granted, it was hard upon the officer that he should be answerable in damages, when the warrant did not give him a legal authority. This statute, therefore, provided that the remedy in such a case should be against the magistrate only. The 6th section did not mean to take away from any person injured by an unlawful warrant the remedy for that injury, but merely exempts the officer from responsibility, if he acts in obedience to the warrant. But the magistrate never was responsible for the mistake of the officer, when he went beyond the authority given by the warrant. This reasoning, however, does not apply to the 8th section; for that section manifestly applies to the case of a magistrate where he would be liable for what he had done, and yet the action against him must be brought within six months. The same reason seems to apply to the case of an officer who is acting in execution

1820.

PARTON *against* WILLIAMS.

cution of his warrant, though not in strict obedience to it. The intention of the legislature must have been, that both the constable and the justice of the peace should be in the same situation with respect to the time in which such actions should be brought against them.

BEST J. I think that the present defendant is entitled to the protection given by the 8th section of the statute. It is entitled, "An act for the rendering justices more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants;" and then the preamble proceeds to state what sort of protection shall be extended to them. It draws the line between those cases where they have wantonly exceeded their authority, and others where they have done so without intending it. It gives a different sort of protection to magistrates from that which it does to officers: the former are to have notice given them, in order that if they have erred they may tender amends. Constables, however, are not bound to act, except under the authority of a magistrate, unless the peace be broken in their view. The nature of their duty being different from that of a magistrate, this act of parliament was intended to give them complete protection. Now, when a constable acts strictly in obedience to the warrant, he is completely protected by the 6th section; but as it is fit that he should also, in cases where he acts bonâ fide but not strictly according to his warrant, be protected like the magistrate who acts bonâ fide but beyond the extent of his jurisdiction, the 8th section extends that protection to him. If that were not so, the magistrate would

1820.

PARTON *against* WILLIAMS.

would be protected, whilst the more ignorant constable, acting under a mistake, would have no protection at all. The words "acting as aforesaid," in the 8th section, refer only to the word "person," immediately preceding, and are equivalent to the words "acting in aid or in assistance to the constable," and not to the words "for any thing done in obedience to any warrant." The case of *Postlethwaite* v. *Gibson*, decided by Lord *Kenyon*, has been referred to. No man can entertain a higher respect for the memory of that noble and learned Judge than I do; but nisi prius decisions, coming even from him, unless they have been acted upon by succeeding Judges sitting in bank, are entitled to very little consideration. It seems to me, therefore, that this rule should be made absolute.

Rule absolute.

HUNT *against* ANDREWS.

Monday, January 24th.

In an action against a game-keeper for a penalty for using a gun to kill game, without being qualified, evidence of the real title to the manor is admissible, for the purpose of negativing the existence of a colourable title in the person under whom the defendant claims to act. Entries in the books of the clerk of the peace of deputations formerly granted to game-keepers by the real owner of the manor, are also evidence to shew that manerial rights were publicly exercised by him, and that the person whose title was set up by defendant, knew that he had not any title whatever.

DEBT for a penalty, for using a gun to kill game, without being qualified. Plea, not guilty. At the trial before *Richardson* J., at the last Summer assizes for the county of *Worcester*, the offence laid in the declaration was proved to have been committed by the defendant, in the manor of *Bordesley*, in that county. The defence was, that the defendant acted under a deputation from Mr. *Geast*, who claimed to be

1820.

Hunt *against* Andrews.

lord of the manor of *Bordesley*; and, to shew that *Geast* had a colourable title, the defendant gave in evidence a deed of bargain and sale, dated the 1st *May*, 1806; whereby, after reciting an indenture of bargain and sale, inrolled in 1802, to make a tenant to the præcipe, for the purpose of suffering a common recovery, and a common recovery suffered accordingly of the hereditaments thereinafter mentioned, Lord *Foley*, for a certain consideration therein mentioned, conveyed to *Geast*, and his heirs, all that manor or reputed manor or lordship of *Bordesley*, otherwise *Bordsley*, with the rights, royalties, privileges, and appurtenances thereto belonging, in the county of *Worcester*; and all that park called *Bordesley Park*, and divers parcels of lands described to be parcel of the possessions of the late dissolved monastery of *Bordesley*, and severed from the rest of the possessions thereof, by a conveyance made by Lord *Windsor* to *Thomas Foley*, together with all deeds relating to the premises conveyed, and copies of all deeds relating to those and other premises. It was further proved, that *Geast*, in 1806, granted a deputation, in which he was described as lord of the manor of *Bordesley*, to a person of the name of *Moor*, who acted as his gamekeeper, and that, afterwards, he granted a similar deputation to the defendant, under which he claimed to act at the time of the committing of the alleged offence. These deputations were inrolled with the clerk of the peace, and certificates granted thereon. It was also proved, that two courts had been held by Mr. *Geast*, one of which was in 1816, and that he and Lord *Foley* had also cut down timber on the wastes of the manor, and that *Geast* had impounded sheep trespassing on the wastes or free-boards, (which were little slips of lands on the sides of lanes,) the adjoining

land

land to which, in some instances, on both sides of the road, were occupied by *Geast* himself, and in others, by his tenants. Upon this evidence, the defendant contended, at the trial, that it was not competent to the plaintiff to give other evidence in reply, in order to shew, that the real title to the manor was not in Mr. *Geast*: the learned judge over-ruled that objection; and the following evidence was given on the part of the plaintiff. First, a grant by King *Henry* 8., dated 27th *April*, 1543, to *Andrew*, then Lord *Windsor*, his heirs and assigns, of the site of the late monastery of *Bordesley*, in the county of *Worcester*, and also all those our lordships and manors of *Bordesley* and *Tardebig*, and divers others, with all rights, &c. thereto belonging. A deed was then produced, dated *February*, 1655, whereby *Thomas* Lord *Windsor* conveyed to *Thomas Foley* all that park, with the appurtenances called *Bordesley*, (all which park, &c., were parcel of the possessions of the dissolved monastery of *Bordesley*, and were divided and separated from the residue of the said lands, parcel of the possessions of the said dissolved monastery, by a river, and did all of them lie on the east side thereof,) together with all messuages, &c., mines, quarries, &c., free-boards, liberty of park, free-warren, &c., and all deeds, &c., relating thereto. There were, however, excepted (amongst other things) to *Lord Windsor*, his heirs and assigns, from this conveyance, all franchises of waifs, *estrays*, felons' goods, deodands, and court-leet, by grant or prescription used, exercised, or of right belonging to the lords of the manor of *Bordesley* or *Tardebig*, for the time being. A marriage-settlement of the 1st and 2d of *September*, 1656, of the then Lord *Windsor*, conveying the manor of *Bordesley* to trustees, &c., and between that period to the

 present,

1820.

HUNT *against* ANDREWS.

present, several settlements belonging to the family of the Earl of *Plymouth*, who was the heir of Lord *Windsor*, were produced; in all of which the manor of *Bordesley* was mentioned. The deputy-clerk of the peace for the county of *Worcester* produced books, which he stated to have received from his predecessor in office, as enrolment books of the deputations in his office, which went back as far as the year 1734. From them it appeared, that the *Plymouth* family had granted deputations to different persons, as their game-keepers of the manor of *Bordesley*, in 1752, 1759, 1774, and 1801. This evidence was objected to by the defendant's counsel, on the ground that the original deputations ought to have been produced, or that notice ought to have been given to the defendants to produce the originals; but the learned Judge over-ruled this objection, and finally directed the jury to say, whether the defendant had proved a fair and colourable title to the manor in Mr. *Geast*, or whether the claim set up by him was without any fair or colourable title, and introduced, for the first time, into the conveyance made to him in 1806. The jury found a verdict for the plaintiff. A rule *nisi* for a new trial having been obtained in last term, on the objections taken at the trial,

Jervis, *Peake*, and *Puller*, were to have shewn cause, but the Court called upon

Scarlett and *Campbell*, in support of the rule. The defendant clearly made out a colourable title in Mr. *Geast*, as lord of the manor of *Bordesley*, by proving the conveyance of the manor to him in 1806; the felling of timber, and the impounding, by him, of sheep trespassing upon the wastes; his holding courts; the appointment of a game-

a game-keeper by him immediately after the purchase; the deputation to the defendant in 1810, and his having acted under it, without interruption, for eight years. Supposing Mr. *Geast* to have title deeds of an earlier date, indisputably establishing his right to the manor, it could not be expected that the defendant should be able to produce them. He had shewn that he had reasonable ground to believe that Mr. *Geast* was lord of the manor, and therefore he could not be guilty of a crime in acting as his game-keeper. In answer to this colourable title, the learned Judge ought not to have admitted the grant of *Henry* 8., and the conveyance from Lord *Windsor* to Mr. *Foley*, in 1656. This was no answer to the colourable title which had been set up, but brought the real title into issue. The plaintiff, in reply, might have disproved the deed of 1806, or contradicted the testimony of any of the witnesses called for the defendant; but to admit Lord *Plymouth*'s earlier title deeds, was to try the right to the manor. If these were admitted, it became necessary that all Mr. *Geast*'s should be produced; and thus to have an inspection of the title deeds, by which any gentleman claims to be lord of a manor, it will only be necessary to bring an action against his game-keeper. *Hankins* v. *Bailey*, and *Blunt* v. *Grimes* (*a*), are authorities to shew that the title to the manor cannot be tried in such an action as this. Besides, the entries in the book of the clerk of the peace for the county of *Worcester*, of deputations alleged to have been granted by the *Plymouth* family, for the manor of *Bordesley*, were not admissible, without evidence either that the deputations had existed and were lost, or that the persons named as game-keepers had acted under them.

(*a*) 4 *T. R.* 681. note.

1820.

HUNT *against* ANDREWS.

ABBOTT C. J. I am of opinion, that, in this case, there ought not to be any new trial. The objection is not to the mode in which the learned judge left the question to the jury, but to the admissibility of the evidence produced at the trial on the part of the plaintiff. The action was brought for a penalty for killing game, without having the qualification required by law. The statute of the 22 & 23 *Car.* 2. *c.* 25. *s.* 2. does not authorize the lord of a manor to appoint a game-keeper to kill game, but merely to seize guns, &c. Under that statute, therefore, a game-keeper would be liable to a penalty for killing game because he was not qualified. The 5 *Anne*, *c.* 14., which is made perpetual by the 9 *Anne*, *c.* 25., enables the lord or lady of a manor to empower a game-keeper to kill game for his or her use. Under that act, therefore, the appointment must be made by the lord or lady of a manor. It has been held, however, that in an action brought to recover a penalty, it is sufficient for the defendant to shew, that he was acting under the appointment of a person who has a reasonable ground of title to the manor, for that is what I understand by the words colourable title. It has been contended, in this case, that it is sufficient that the game-keeper bonâ fide believes that he is acting under the authority of a person who has a sufficient title. In *Calcraft* v. *Gibbs* (*a*), however, this Court were of opinion, that that was not sufficient, but that the true question, in such a case, was not whether the game-keeper acted bonâ fide, but whether the person, under whose deputation he acted, had any colourable title to the manor or not. The exemption of the defendant was held to depend on the colourable

(*a*) 1 *T. R.* 681.

title

1820.

HUNT *against* ANDREWS.

title of the person under whose authority he acted, and that is less at variance with the general rule of law, that a person deriving a title from another shall not be in a better situation than the person under whom he derives it. Taking that, therefore, to be the true principle upon which the Court is bound to act on such a case, the first question is, whether the defendant made out, in evidence, any colourable title in Mr. *Geast*. Now it appeared that in 1806 he had purchased a considerable estate of Lord *Foley*, the conveyance of which recited a prior conveyance in 1802, which was not produced. Upon that occasion, Mr. *Geast* must either have taken the original title deeds, or at least copies of them, and yet none of these are produced. The only evidence of a right in him to the manor of *Bordesley*, is, that from 1806, he has exercised certain rights as lord of the manor. Now the only fact which, in my judgment, in any degree goes to shew that he has any colourable title to the manor, is the appointment, by him, of two game-keepers; for the act of felling timber does not prove that he has any right to the manor, for the right to fell timber on the waste lands, or free-boards, belongs to the owner of the soil; and one man may have the waste land, and another may have the manor. The impounding of the sheep was for trespasses committed on narrow pieces of land, the fields adjoining to which were both owned and occupied by *Geast*; that, therefore, was not in the exercise of any manerial right. In some instances, indeed, the land was in the possession of his tenants, to whom, at the time, the power of distress belonged. The fact of Mr. *Geast* having held two courts, one in 1806, and one at an earlier period, seems to me an attempt to make evidence of a colourable title; for a court is a

1820.

HUNT *against* ANDREWS.

matter of distinct grant, and does not necessarily belong to a manor. Now this was the whole evidence to shew that *Geast* had a colourable title to the manor. It was not shewn that Lord *Foley*, or his ancestors, had made any deputations before 1806: and if they had not, the deputations made by *Geast* would not give him even a colourable title. It seems to me, that the defendant did not make out any colourable title in *Geast*. Admitting, however, that the evidence given on the part of the defendant raised a presumption that *Geast* had a colourable title, and that he had exercised manerial rights, I am of opinion, that it was competent to the plaintiff to shew, by other evidence, that before 1806 the practice had been wholly different; that the family from whom Lord *Foley*'s ancestors purchased, had, notwithstanding the conveyance to him, claimed the manor, and recorded their claim in Lord *Foley*'s deeds; that they had exercised manerial rights, by appointing game-keepers, who had shot over the manor, and exercised the very right in question. It was further objected, that the entries in the enrolment-book, of deputations to persons who were not proved to have acted, and whose deputations were not produced, were not admissible evidence. I think, however, that those entries were evidence for the specific purpose for which they were produced, viz. to shew that Mr. *Geast* had not any reasonable ground for considering himself lord of the manor. For the proof of the fact, that there existed public documents in his own county, to which he might have had access, and by which he would have been informed, that the family from whom Lord *Foley* had purchased, had always continued to exercise the right of appointing game-keepers, as lords of the manor of *Bordesley*, would, at least, be evidence to go to the jury, that

Geast

1820.

HUNT *against* ANDREWS.

Geast knew that he had no title whatever to it. The question, as to whether a person has a reasonable ground for believing that he has a title, must depend upon the means of knowledge within his power, as to the actual title; and the object of this evidence was, at least, to shew, that by using common diligence, he might have learnt, from these documents, that manerial rights had been openly exercised by others, and that he had no ground of claim whatever. For these reasons, it seems to me, that the evidence was properly received, properly left to the jury, and that the jury have drawn a right conclusion.

BAYLEY J. I think that all the evidence was properly received. It having been proved, that the defendant had used a gun for the purpose of killing game, the plaintiff was entitled to a verdict, unless the defendant shewed that he was game-keeper to the lord or lady of a manor, or some royalty. It is sufficient, however, for him, in this penal action, to shew, that he acted under the authority of a person who had a colourable title. Upon the evidence given by the defendant, I think, for the reasons given by my Lord, that he did not make out that Mr. *Geast* had a colourable title. Assuming, however, that there was evidence to go to a jury, of a colourable title, I think that the evidence given in reply was admissible. The first objection is, that evidence of the real title is not to be admitted at all; but I think it is admissible to rebut the presumption of colourable title. The proving of the grant, in this case, to another person, and the exercise of a right by that person, has a tendency to shew that the party claiming to exercise a right, ought to have known, and must have known, that he had no title whatever. I think,

1820.

HUNT *against* ANDREWS.

think, therefore, that evidence of an actual title is admissible, for the purpose of repudiating a colourable title, and of shewing that the party claiming that colourable title must have known that he had no title whatever. The proof of the actual title, indeed, is no answer in such an action as this, if a colourable title remain proved in the defendant; but it is admissible for the reason I have stated. I think, also, that the entries of the deputations by the clerk of the peace were evidence to shew, that from time to time persons claiming adversely to the title under which Mr. *Geast* claimed, had exercised the right of appointing gamekeepers, by applying to the clerk of the peace to get certificates for persons whom they appointed. It seems to me that these entries are evidence, because it is the duty of a clerk of the peace to register deputations, in reference to which such applications are made; and such register is a public document which may be resorted to, for the purpose of shewing by whom these applications were made. I think, therefore, that this rule should be discharged.

HOLROYD J. I am of the same opinion, that this verdict was right, and that the evidence was properly received. For the reasons already stated, I think that the defendant did not make out, in evidence, a colourable title in Mr. *Geast*. I think, also, that the evidence given in reply was admissible, for the purpose of doing away any presumption of a colourable title arising from the acts which had been proved on the part of the defendant. The tendency of that evidence was to shew, that it was within the knowledge of *Geast*, that he had no right to exercise manerial rights, and, therefore, to disprove the colourable title altogether. For the evidence

1820.

HUNT *against* ANDREWS.

dence is, that, after the conveyance of the property to *Thomas Foley*, the *Plymouth* family had exercised manerial rights which were wholly inconsistent with the right now claimed; and, among other things, different deputations, by them, were given in evidence, and one only five years prior to the conveyance to Mr. *Geast*. This shews, that the manerial rights were in the possession and exercise not of Lord *Foley*, under whom Mr. *Geast* claimed, but of the person from whom Lord *Foley* himself had derived his right. Now it is clear that the mere appointment of two game-keepers by Mr. *Geast* will not divest the possession of the manerial rights out of the person who had always exercised them. I think, therefore, that the possession of the manerial rights continued the same as if Mr. *Geast* had not appointed any game-keeper: and if so, this evidence goes to disprove that Mr. *Geast* was lord of the manor de facto. It is not necessary, for the purpose of this action, that he should be lord of the manor de jure: for, if that were so, justices of the peace would be empowered, incidentally, to try the right of the manor. As to the second point, I am of opinion, that the entries in the enrolment book, kept by the clerk of the peace, were admissible in evidence. The case of *Kinnersley* v. *Orpe and Others* (a) is an authority in point. The question there arose upon a grant under a lease from the duchy of *Lancaster*, in which there was a proviso, that the lease should be enrolled with the auditor of the duchy. To prove the enrolment, a certificate or memorandum, on the margin of the lease, was held to be sufficient evidence, on the ground that it was the certificate of a public officer. The principle upon which

(a) *Doug.* 56.

I ap-

1820.

Hunt *against* Andrews.

I apprehend that case to have been decided was this, that the certificate being made by the officer authorized to make the enrolment, in the usual course of his office, could not be supposed to have been done for any improper purpose; and that it was, therefore, evidence of the fact of enrolment. In this case, an act of parliament directs that a certificate shall be granted upon a stamp: it is the duty of the officer to keep a list of the certificates granted. This evidence, therefore, will be sufficient evidence, that they were so granted. It appears to me, therefore, that the rule for a new trial must be discharged.

Best J. It was decided in *Calcraft* v. *Gibbs*, that it is not sufficient, in such an action as this, for a defendant to believe that the person under whose deputation he acts has a title, but he must shew that that person had at least a colourable title; and that being so, I think, for the reasons already given, that it was not shewn in this case that *Geast* had any colourable title whatever. Assuming, however, that that evidence raised a presumption of colourable title in Mr. *Geast*, I think it was competent to rebut that presumption by the evidence given on the part of the plaintiff, the effect of which was to destroy altogether any inference of colourable title. I think, also, that the entries in the book produced by the clerk of the peace were admissible evidence, without producing the originals. In this case, the entries were in a book deposited in a public office, and are made fifty or a hundred years ago, and the law is not so absurd as to require deputations to be produced which have been granted so long ago. It has been contended, however, that these

entries

1820.

HUNT *against* ANDREWS.

entries are mere evidence of the fact of an enrolment having been made. I think, however, that they are evidence that the parties who caused the enrolments to be made exercised rights as lords of the manor. It is most important evidence to shew, that Mr. *Geast* knew that he had no title whatever; for if he consulted these documents, he must have known that he had no title; if he did not consult them, he did not avail himself of the means of knowledge that were in his power. I think, therefore, that this rule should be discharged.

Rule discharged.

MADRAZO *against* WILLES.

Monday, January 24th.

A foreigner, who is not prohibited from carrying on the slave-trade by the laws of his own country, may, in a *British* court of justice, recover damages sustained by him in respect of the wrongful seizure, by a *British* subject, of a cargo of slaves on board of a ship then employed by him in carrying on the *African* slave-trade.

THE declaration stated that the plaintiff was a subject of the king of *Spain*, and that on the 12th of *July*, 1817, at *Havannah*, in the island of *Cuba*, he was lawfully possessed of a certain brig called, &c., and continued so possessed until the committing of the trespasses after mentioned, to wit, at, &c.; and that the said brig was, to wit, on, &c., lawfully cleared out for a certain voyage in the slave-trade, to wit, from *Havannah* to the coast of *Africa*, and back; and that on the 16th of *January*, 1818, on the high seas, to wit, off *Cape St. Paul's*, on the coast of *Africa*, defendant, with force and arms, seized the said brig, together with her stores, &c., and 300 slaves, and also divers goods, &c. on board of the said brig, and kept and detained them for a long time, and converted and disposed of the slaves, goods, &c., to his own use; by

means

1820.

Madrazo *against* Willes.

means whereof the said brig was prevented from further prosecuting the said voyage, and the plaintiff deprived of great gains, which would have accrued from the slaves and goods, and from taking on board other slaves and other goods, and from carrying them to the island of *Cuba*: plea, not guilty. At the trial at the last *London* sittings after *Michaelmas* term, it appeared that the defendant, who was a captain in the royal navy, had, on the 16th of *January*, 1818, off *Cape St. Paul's*, unlawfully taken possession of the ship of the plaintiff, a *Spanish* merchant, which was engaged in the slave-trade on the coast of *Africa*. The only question which arose was as to the amount of damages. It occurred to the Lord Chief Justice at the trial, that the plaintiff was not entitled to recover the value of the slaves in an *English* court of justice; and, accordingly, he desired the jury to find their verdict separately for each part of the damage, giving to the defendant liberty to move to reduce the verdict to the smaller sum, in case the Court should agree with him on the point. The jury found a verdict for the plaintiff, damages 21,180*l*., being for the deterioration of the ship's stores and goods 3000*l*., and for the supposed profit of the cargo of slaves 18,180*l*. And now,

Jervis moved for a rule nisi to reduce the damages to 3000*l*. By the 47 *G*. 3. *c*. 36., the slave-trade, and all dealings connected with it, were declared unlawful. It follows, therefore, as a consequence, that no one can be allowed to recover damages in respect of a cargo of slaves. And the 51 *G*. 3. *c*. 23. goes still further; for it declares that trade to be contrary to the principles of justice,

justice, humanity, and sound policy. Now, it being the duty of *English* courts of justice to be guided by those principles, no one, whether he be a foreigner or an *Englishman*, can be permitted there to claim any compensation in respect of such a traffic. The 58 *G.* 3. *c.* 36. is, indeed, relied on by the other side; but that act, which was passed with a view of carrying into effect a treaty with *Spain* on this subject, ought not to affect the present question. Indeed, the fourth article of the treaty is strongly in favour of the defendant; for it provides, that the *British* government shall make compensation, out of a sum provided by parliament, to *Spanish* merchants, for the seizure of their ships, which would seem to prove, that, independently of that, such merchants had no other remedy.

ABBOTT C. J. On further consideration, it appears to me that there is no sufficient ground for reducing this verdict to the smaller sum found by the jury. Considering the very extensive language used in the two acts of parliament to which we have been referred, I had at first thought that it was not competent, even for a foreigner, to come into an *English* court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the *British* legislature, in such strong language, to be unlawful. It was with that view that I directed the jury to separate the damages in this case; for it occurred to me, that though the plaintiff might not be entitled to recover for the slaves, still, inasmuch as, at all events, the defendant ought to have taken away the slaves promptly, if at all, the subseqnent detention of the ship was an injury, for which the plaintiff was entitled to compensation.

But

1820.

MADRAZO *against* WILLES.

But I am now satisfied that the words used by the legislature, although large and extensive, can only be taken to be applicable to *British* subjects. By the 58 *G.* 3. *c.* 36. it appears that a treaty had been made with *Spain* for the prohibition of an important branch of the trade; and that, with regard to the remainder, special provisions had been made, and a special court constituted for the purpose of settling the disputes which might occur. Now that shows most strongly, that but for such a treaty, the trade would have been perfectly legal in a *Spaniard*; and the 10th section of that act, by which a certain sum is provided, as a full compensation for all losses sustained in consequence of the seizure of vessels previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject; for it enables the parties sued to plead that clause in bar of the action, which would obviously have been unnecessary, if under the previous acts no action could have been maintained at all. This clause, therefore, seems to me to be a legislative recognition of a foreigner's right of suit. And by the 11th and 12th sections it is provided, that all suits commenced in the Courts of Admiralty shall proceed, if commenced; and that the damages, &c., when recovered, shall be paid to the government of this country. All these clauses, taken together, appear to me to shew, that what occurred to me at nisi prius was not a sound exposition of the law. I am therefore of opinion, that the verdict for the larger sum found by the jury is right, and that we ought to refuse this rule.

BAYLEY J. I do not think that there is sufficient doubt, in this case, to induce us to grant a rule. A

British

1820.

MADRAZO *against* WILLES.

British court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a *British* subject to them. It is no answer to the present action to say, that it would not be maintainable by a *British* subject; for the only questions are, whether the act of the defendant be wrongful, and what injury the plaintiff has sustained from it? Although the language used by the legislature in the statute referred to, is undoubtedly very strong, yet it can only apply to *British* subjects, and can only render the slave-trade unlawful if carried on by them: it cannot apply, in any way, to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not; and as a *Spaniard* cannot be considered as bound by the acts of the *British* legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained. He had a legal property in the slaves, of which he has, by the defendant's act, been deprived. The 58 *G.* 3. *c.* 36. proceeds on this principle; and the provisions referred to by my Lord Chief Justice, seem to me to be conclusive on the subject. I think, therefore, that we ought not to disturb this verdict.

HOLROYD J. However much I may regret that any damages can be recoverable for such a subject as this, yet I think we are bound to say that this plaintiff is entitled to them. I agree with the construction which has been put on the 58 *G.* 3. *c.* 36.; and I think, that even independently of that act, the action

1820.

Madrazo *against* Willes.

would have been maintainable for the loss of the slaves.

Best J. The statutes which have been referred to, speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the *British* nation. The declaration of the *British* legislature, that the slave-trade is contrary to justice and humanity, cannot affect the subjects of other countries, or prevent them from carrying on this trade out of the limits of the *British* dominions. The assertion of a right to controul the subjects of other states in this respect, would be inconsistent with that independence which we acknowledge that every foreign government possesses. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave-trade is contrary to what may be called the common law of nations. It was, until lately, carried on by all the nations of *Europe*. A practice so sanctioned can only be rendered illegal by the consent of all the powers. Most of the states of *Christendom* have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade; but *Spain* has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this

country

1820.

MADRAZO *against* WILLES.

country for any injury sustained by them from such an interruption. These principles are confirmed by the decisions of the Court of Admiralty, and also by a judgment of Sir *William Grant*, pronounced at the Cock-pit. The cases to which I allude are, the *Fortuna*, the *Donna Marianna*, and the *Diana*, in the Admiralty Court; and the *Admedie*, before the Privy Council. (*a*) These cases establish this rule, that ships, which belong to countries that have prohibited the slave-trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations. The subjects of *Spain* have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our government. The rule for reducing the damages, in this case, must therefore be refused.

Rule refused.

(*a*) *Dodson's Ad. Rep.* 81. 91. 95.

1820.

Tuesday, January 25th.

WEBSTER and WOODYER, Executrix and Executor of HEATLEY, *against* SPENCER.

One of two executors having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, and afterwards permitted the money to be lent out to a third person, by whom it was paid to *A*. *A*., on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor. Held, that both executors might join in an action brought to recover the money against *A*.: Held, also, that it does not amount to a devastavit, if an executor lends out on private security money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject.

ASSUMPSIT for money lent, &c. by testator. The declaration contained counts upon promises to the testator in his life-time, and also to the plaintiffs after his death. There were also two counts, one for money had and received to the use of the plaintiffs, as executor and executrix, and the other, on an account stated with them in that character. Plea, general issue. At the trial at the last Summer assizes for *Chester*, it appeared, that *Thomas Heatley*, by his will, bequeathed as follows: "Unto my son *Benjamin*'s four children, the sum of 10*l*. each, with interest, the money now in the hands of *Joseph Jennions*." The will was proved by *Anne Webster* alone. It also appeared, that soon after the testator's death, *Jennions* paid the 10*l*. to *Anne Webster*, and it had been lent, through the intervention of *Benjamin Heatley*, to *John Winpenny*, who, having also borrowed 20*l*. from *Benjamin Heatley*, gave a promissory note for 60*l*. to the latter. This note was afterwards indorsed over to the defendant's wife. The defendant had admitted, on a claim being made by *Webster*, as executrix, that he had received from *Winpenny* the sum due on this note, and that 42*l*., part of it, belonged to *Benjamin Heatley*'s children, but he had refused to pay it over to her. The other executor,

Woodyer,

1820.

WEBSTER *against* SPENCER.

Woodyer, had not assented to the present action. Under these circumstances, the learned Judges thought that *Woodyer* ought not to have been joined in the action, and directed a nonsuit, giving liberty to the plaintiffs to move to enter a verdict for 42*l.*, in case this court should be of a different opinion. *D. F. Jones*, in last *Michaelmas* term, having obtained a rule nisi to that effect,

W. D. Evans and *Littledale* shewed cause. In this case, *Woodyer* ought not to have been joined in the action, for *Webster*'s claim is not in her representative, but in her personal capacity. The moment *Jennions* paid the money into her hands, the debt to the testator wholly ceased, and the subsequent transaction between her and *Winpenny*, could give her no right to maintain an action against *Winpenny* in her representative capacity. For an executor, as such, cannot maintain an action for money lent by himself. He may, indeed, maintain an action for goods sold, but that is, because it is his duty to sell the testator's goods, in order to reduce them to money. But if he afterwards lend that money to a third person, he must maintain an action for it in his own name. [*Holroyd* J. Here the action is not upon the contract of lending with *Winpenny*.] It is, however, for money had and received through the medium of a loan. The ground is, that the money, when once received by the executor, becomes assets; and having once become so, it does not, if lent out by him, remain assets any longer. In *Ord* v. *Fenwick* (*a*), Lord *Ellenborough*, in giving judgment, puts this case, and

(*a*) 3 *East*, 109.

1820.

WEBSTER *against* SPENCER.

intimates his opinion, strongly, on the point. Here it is, in substance, an action for money had and received on a loan, which she was not authorised, as executrix, to make. Her conduct, in this case, amounts to a devastavit, for she suffered *B. H.* to lend the money, and to take a security, payable to himself alone. Then, if so, how can the money be due to her as executrix. If not, then it is clear, that the other executor ought not to have been joined in the action, and the nonsuit was right.

D. F. Jones and *W. J. Law*, contrà, stopped by the Court.

ABBOTT C. J. The question in this case is, whether this money, when recovered, would be assets in the hands of the executors; if it would, then the action is properly brought in the name of both. It appears to me, that this money would be assets. The circumstances are these. *Thomas Heatley*, by his will, left a specific sum of 40*l.*, to be paid, with interest, by his executors, in equal proportions of 10*l.*, to the four children of *Benjamin*, his son; and he stated, that the money was then in the hands of *Joseph Jennions*. It appears that *Anne Webster* alone proved the will. Now, if an action had been brought against *Jennions* for the money, it is clear, that the other executor must have been joined. But *Jennions* paid it, without any action, to *Anne Webster*, from whom, it appears to have passed to *Benjamin*, and to have been lent by him to *Winpenny*, together with another sum of 20*l.* of his own. For both these sums, a promissory note for 60*l.* was given, which was afterwards endorsed over to *Spencer*. Now both *Spencer* and *Winpenny* knew to whom the 40*l.* belonged, and, it was under these circumstances, that *Spencer* made the ac-

know-

1820.

WEBSTER *against* SPENCER.

knowledgment, that he had received 60*l.* from *Winpenny*, and that 40*l.* belonged to *Benjamin*'s children, as having been left to them by their grandfather. The question then is, whether the executors have not, as trustees, a right to recover this money for the use of the children. If *Spencer* misapplies it, the executors would be liable, and he therefore can have no right to retain the money, as against them. It is said, that *Anne Webster*, by lending this money, was guilty of a devastavit: it is not clear, however, from the evidence, that she did lend the money to *Benjamin Heatley*. This, however, is not an action for money lent, but one against *Spencer*, to whom *Winpenny* has paid the money. It would be too much to say, that an executor, who lends money belonging to the testator, which is not wanted for present purposes, is therefore guilty of a devastavit. And if the borrower knows, at the time, that it is the money of the testator, I can see no reason why the executor should not recover it in that character. The special circumstances of this case are, however, the ground of my decision; and I think, that both these executors, having been entrusted, by the testator, with the care of this sum of money, have a right to recover it from the present defendant, in their character of executors, and, consequently, that it was right to join both of them in the present action.

BAYLEY J. I have no doubt in this case, that it was right to join both executors. An executor derives title, not from the probate, but from the will, and a probate granted to one executor enures to the benefit of all; and all must join in an action brought in that character. Then the only question in the present case is, whether

1820.

WEBSTER *against* SPENCER.

the plaintiffs are entitled to bring this action as executors, and that depends upon this, whether the money, when recovered, would be assets? Now we trace this money from *Jennions* to *Winpenny*, and from him to *Spencer*, who, by his own acknowledgment, receives it for the children of *Benjamin Heatley*; and they have a right to look to the executors, who are accountable to them for the money. It seems to me, that if we can trace the money from the executors to the defendant, who received it, knowing it to be the money of the testator, that it still remains assets, recoverable by the executors. It is said, that this is not so, because the loan by *Anne Webster* was wrongful, and amounted to a devastavit. But if that were the case, it would follow, that she, by her own wrongful act, might improve her own personal estate. For then, upon her death, this money, instead of going to the surviving executor, would go to her personal representative. The argument would come to this, that if an executor were wrongfully to dispose of a specific chattel belonging to the testator, and afterwards to recover possession of it, the property would belong to him in his individual, and not in his representative character. There may be many cases, in which it is the duty of an executor to lend out money belonging to the testator. Suppose he has in his hands a sum which will not be called for till a distant period, is it to lie idle during all that time? And, previous to the institution of public funds, it must have been lent out, in all cases, upon private security. It seems to me, that upon this subject, the executor should be allowed to exercise a fair and honest discretion, and, that if he does so, he cannot be guilty of a devastavit. The foundation of the objection, therefore, fails; and,

1820.

WEBSTER *against* SPENCER.

and, as the circumstances of this case enable us to trace the money, it seems to me, that in the transaction, *B. Heatley* and *Spencer*, both, acted as agents of the executors, and that the latter have now a right to require the money to be placed in their hands, for the purpose of executing the trusts reposed in them by the will.

HOLROYD J. I am of the same opinion. Executors derive their authority, not from the probate but from the will; and it is clear, that if this money, when recovered, would be assets, both executors must join in the action. Now there is no doubt that this money was originally assets, and that that fact was known to the defendant when he received it; and if so, it seems to me, that, in an action, for money had and received, brought against him to recover it, the damages will be also assets. Even taking it as a loan to him, it does not appear to me, that it would make any difference. It would still be a part of the testator's property, for the detention of which damages might be recovered, and which would be assets. It seems to me, therefore, that the executors, in some cases, might sustain a count for money lent by themselves, and join it with a count for money lent by the testator, in his life-time. In the case of an insolvent estate, it would be different; because there they would be bound, not to lend the money, but to apply it in payment of the testator's debts. I think, therefore, that this rule ought to be made absolute.

BEST J. concurred.

Rule absolute.

1820.

Friday, January 28th.

The Duke of BEDFORD *against* EMMETT.

An act of parliament, the preamble of which recited the grant of a market, and that it was expedient that provision should be made for the better regulating of the market, and for the more easy collection of the tolls and dues payable in the market, enacted, "That it should be lawful for the owner of the market to take from all persons who should place, pitch, or expose for sale, within any part of the market, any fruits, &c., all such tolls as are usually collected or taken within the said market, or which are payable for or in respect of the same:" Held, that the owner of the market, although not entitled at common law to any toll, might, under this clause of the act, recover such tolls as, at the time of passing of this act, were usually paid in any part of the said market; and that, although the tolls then usually paid in respect of the same articles were different in different parts of the market.

ASSUMPSIT for tolls and duties due and payable by the defendant to the plaintiff, as owner and proprietor of *Covent Garden Market*, and of the dues, duties, and tolls thereto belonging and arising thereby and therefrom, for and in respect of the defendant's having placed, pitched, and exposed for sale, and sold within the said market, divers large quantities of fruit, flowers, vegetables, and herbs. The second count was for tolls payable in respect of fruits, flowers, pitched, placed, and exposed for sale within *Covent Garden Market*. Plea, first, except as to the sum of 4*d*. Non-assumpsit; and as to that sum a tender. At the trial before *Abbott* C. J., at the last *Middlesex* sittings, the question was, whether the toll payable for fruit and vegetables was 4*d*. a cart-load, or a separate toll on each basket? It appeared, in the course of the trial, that the market was practically subdivided into smaller markets, denominated the fruit-market, the casualty-market, and the potatoe-market. In that part called the fruit-market, the toll usually taken was 2*d*. per basket for strawberries and gooseberries; of which a cart would contain several. There were some few instances, however, in which the payment of this toll, even in the fruit-market, had been successfully resisted. In other parts of the market, the toll taken for the same articles, was only 4*d*. per cart-

load.

1820.

Duke of BEDFORD *against* EMMETT.

load. The articles, in respect of which the present toll was claimed, had been pitched for sale in the *fruit-market*. King *Charles* II., by letters patent granted unto *William*, Earl of *Bedford*, that he, his heirs and assigns, should and might from henceforth, for ever, have, hold, and keep a market within the parish of *St. Paul Covent Garden*, in a certain place there, then called *The Piazza*, in the county of *Middlesex*, near the church, &c.: (the limits of the market were then described,) for the buying and selling of all and all kinds of fruits, flowers, roots, and herbs whatsoever, together with all liberties, free customs, tolls, stallage, piccage, and all other profits, advantages, and emoluments whatsoever, to the like market in anywise belonging, or with the same usually had and enjoyed. But the grant did not give any specific toll. By an act of the 53 *G.* 3. *c.* 71., reciting the grant in the preamble, and "that it was expedient that provision should be made for the better regulating and ordering of the market, and of the persons resorting thereto, and for the more easy collection and recovery of the tolls and dues payable in the said market, or in respect thereof: it was enacted, by *s.* 5., that it should be lawful for the owner of the market, and his lessees, to demand and take from all persons who shall place, pitch, or expose for sale, or sell, within any part of the said market, any fruits, flowers, vegetables, roots, or herbs, all such tolls as are usually collected or taken within the said market, *or* which are payable for or in respect of the same;" and that, afterwards, no tolls shall be payable by any persons who shall buy any fruits, &c. within the said market, or for or in respect of any such fruits so by them bought within the said market, unless the same

shall

1820.

Duke of Bedford against Emmett.

shall be by them again placed, pitched, or exposed for sale, or sold within the said market. And, by section 8. it was enacted, "that nothing in that act contained, should in any manner alter, vary, lessen, diminish, or affect the title of the Duke of *Bedford*, to stallage, piccage, or any other liberties, customs, profits, advantages, or emoluments whatsoever to the said market belonging. The Lord Chief Justice was of opinion, that this act of parliament recognised a right in the owner of the market to such tolls, as, at the time of the act, were usually taken or collected; and he directed the jury to say, by their verdict, whether, in that part of the market, called *The Fruit-market*, the toll usually collected or paid, was 4*d*. a cart-load, or the larger toll claimed by the plaintiff. The jury found a verdict for the plaintiff for the larger toll.

Marryat now moved for a new trial. This being a market created within the time of legal memory, the plaintiff cannot claim a toll by prescription; and the grant itself not having specified any toll, it is clear, that no toll was due at common law. 2 *Institute*, 220. and *Osbuston* v. *James* (*a*), are authorities in point. Besides, there cannot be two distinct tolls for the same article, in different parts of the same market. The 53 *G*. 3. *c*. 71. does not create any new toll. The object of the legislature, as stated in the preamble, was merely to regulate the collection of such tolls as were then payable; and, for that purpose, the obligation of paying the toll is transferred from the buyer to the

(*a*) *Lutw.* 1380. See also *Heddy* v. *Wheelhouse*, *Cro. Eliz.* 558. *Palmer*, 77. 86. *Moore*, 474.

seller.

1820.

Duke of BEDFORD *against* EMMETT.

seller. The 5th section, indeed, enacts, "that the owner of the market shall be entitled to take all such tolls as are usually taken or collected within the said market, *or* which are payable for or in respect of the same; but the word *or*, consistently with the general intention of this act, must be read *and*; for the intention of the legislature was, not to create any new right of toll, but merely to facilitate the collection of such tolls as were then payable in the said market. The toll claimed in this case, is rather in the nature of stallage, and, if it be stallage, it is expressly enacted, by the 8th section, that the right of the owner of the market in that respect, is not to be in any degree affected. In *Lowdon* v. *Hierons* (*a*), the court of Common Pleas were of opinion, that this act of parliament did not, in any respect vary the common law right to toll.

ABBOTT C. J. The only ground of the application for a new trial is, that the case was not correctly left to the jury. I was of opinion, at the trial, that, under the fifth section of this act of parliament, the jury had only to enquire what tolls had been usually collected and paid at the time of passing the act; and that they were not to enquire what rights the grantee might originally have had under the grant from King *Charles* II.: for the acts seemed to me to have been passed with the intention of putting to rest all such questions of law, as to the original right to tell. I am still of the same opinion. The jury have, in this case, found that this toll had, previously to the passing of this act, been usually paid in the fruit-market; and, whatever doubts

(*a*) 2 *B. Moore*, 102.

might

1820.

Duke of BEDFORD *against* EMMETT.

might have existed under the common law, as to the right to a different toll in different parts of the same market, yet that doubt was, I think, certainly removed by the act of parliament. For the only question under that act is, as to the usage, and there seems to be no objection to an usage applicable to the payment of different tolls for the same fruits and vegetables, in different parts of the same market. I think, therefore, that there is no ground for a new trial.

BAYLEY J. It seems to me, that when the act of parliament is considered, the direction of the Lord Chief Justice, will be found to be quite right. The objection is, that it is impossible to sustain a different toll for the same article, in different parts of the same market. If this had been a toll at common law, there would be great weight in the objection. A mere market toll is payable by the buyer only, but in addition to this, other tolls are payable by the seller to the owner of the soil. Of this sort, are stallage and piccage, which are very distinguishable from a common market toll. For it has been decided, in the case of a market held on borough *English* land, that the former descend to the special heir, and the latter to the heir-general. In this case, by the original grant recited in the act of parliament, the proprietor of the land was empowered to hold and keep a market for the buying and selling of fruits and vegetables, &c., together with all liberties, free customs, tolls, stallage, piccage, and all other profits, advantages, and emoluments whatsoever, to the like market in anywise belonging; and the object of the act seems to have been, to give a more easy remedy for the recovery of tolls. For it says, in the

1820.

Duke of BEDFORD *against* EMMETT.

the fifth section, that it shall and may be lawful for the owner of the market, to demand from every person who shall place, pitch, or expose for sale, or sell, within any part of the market, any fruit, &c., all such toll as is usually taken or collected within the said market, or which is payable for and in respect of the same; and then it proceeds to state, that the buyer shall not be liable for any toll; and the act not only transfers the toll from the seller to the buyer, but also imposes it on the seller, where there is no buyer. It goes further, therefore, than a mere market-toll, and seems, to me, to include the case of a stallage and piccage toll; and if, therefore, a person places or pitches any articles for for sale, he is, under this act, to pay what is usually taken for placing and pitching. If it is admitted, that this toll is in the nature of stallage, there is an end of the question; for one part of a market may be so much more convenient than another, for the purpose of exposing wares for sale, as to justify a different payment for the privilege of erecting stalls there; and if the usage has established a particular payment in any part, it seems to me, that the words of the act are competent to give to the owner that compensation, in each part of the market, which the usage or custom may have established. It is said, that in this clause, the word "*or*" is to be construed "*and*." But that cannot be so, for otherwise the words "usually taken or collected in the said market," would be wholly useless. The true construction seems to be this: the act contemplated two distinct classes of cases, and provided, that if there were a settled usage, that usage should regulate the payment in future: but if not, that then the owner of the market should take such toll as was

pay-

1820.

Duke of BEDFORD *against* EMMETT.

payable. This construction gives effect to every word in the clause, which, by the settled rules of construction, the Court is bound to do if possible. This being the meaning of the act, the only remaining question in the case, is a question of fact, as to which, it sufficient to say, that there was evidence on both sides, and the jury have determined the point.

HOLROYD J. I think that the direction of the Lord Chief Justice was right, and that this was in the nature of stallage, rather than of a strict market-toll. The latter is payable by the buyer only, but here, it is taken from the seller, and that whether his goods are sold or not. Now, by the 5th section of the act of parliament, the legislature has given a right to the owner of the market to take such tolls as were then usually collected or paid, or such as were payable. If, therefore, there was a general usage, that usage was to regulate in future; if not, then the owner was to resort to such rights as he legally possessed. In the former part of the clause, however, the question of right is not involved. In *Rex* v. *Birch* (*a*), a similar question arose as to the construction of the charter of the corporation of *Liverpool*, and there it was considered, that however the usage as to the mode of election there, had originated, previously to the charter of *Car.* 2., still, if there was an usage in fact proved, that usage, by the charter, was to regulate future elections; and here I think, that according to the true construction to be put upon this clause, the only question is, what tolls were, in fact, usually taken taken previously to the passing of the act; and as this

(*a*) 4 *T. R.* 608.

toll

1820.

Duke of BEDFORD *against* EMMETT.

toll seems to me in the nature of stallage. I can see nothing unlawful in the owner of the market taking a different toll, in different parts of it, in consideration of the greater convenience of situation to the sellers of the goods. As to the question of fact, I cannot say that the jury have found a verdict so contrary to the evidence, as to justify the Court in setting it aside. (*a*)

Rule refused.

(*a*) *Best* J. was absent in the Bail Court.

The KING *against* GLENN.

Saturday, January 29th.

Practice.

THE defendant, in this case, had been prosecutrix in an indictment for a conspiracy, upon which the then defendants were found guilty. An indictment, however, was found against her for perjury, and another against *Mary Whitby*, one of the defendant's witnesses. They stood for trial at the last *London* sittings, as special juries, the indictment against the defendant standing first in order in the paper.

Jeremy now applied to quash this indictment, upon the usual terms.

Moore, contrà, contended, on the authority of *The King* v. *Webb* (*a*), that it ought only to be done on the special terms, that the prosecutor should be named, and that this indictment should stand in the same situation as the first would have done.

(*a*) 1 *Blackstone*, 460.

1820.

The King *against* Glenn.

The Court directed the rule to be drawn up accordingly, when the prosecutor's name should be disclosed: and

The rule drawn up was, that the first indictment should be quashed on the payment of costs by the prosecutors, the defendant to appear on the 12th *February*; the issue to be joined on the second indictment to stand for trial in the sittings-paper in the same situation, and to come on for trial in the same order with reference to the prosecution against *Mary Whitby* as the issue joined on the former indictment.

Saturday, January 29th.

The King *against* The Inhabitants of Mildenhall.

In settlement by hiring and service, the pauper is settled where his place of rest is; and therefore, where a servant, who drove the mail cart, had a bed provided for him by the year at *N.*, where he rested every night during four or five hours in the middle of the night, and afterwards returned back in the morning to his master's house at *M.*, and usually went to bed in his own exclusive room for about two hours: Held, that his place of rest was in *M.*, and that his settlement was there also.

TWO justices, by their order, dated 15th *January*, 1819, removed *Winner Cooke* and *Susan* his wife, from the parish of *Mildenhall*, in the county of *Suffolk*, to the parish of *Newmarket, All Saints*, in the county of *Cambridge*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:

On the 1st of *May*, 1817, the pauper being a single man, let himself as a yearly servant to *Richard Bailey*, of *Mildenhall*, in the county *Suffolk*, and entered into his service on the same day. The pauper was employed by his master every day from the commencement of his service up to the 5th of *April*, 1818, to drive the mail-

cart

1820.

The KING *against* The Inhabitants of MILDENHALL.

cart to and from *Newmarket* and *Mildenhall*. For this purpose he started every night from *Mildenhall* and arrived at *Newmarket* at about eleven o'clock in the evening; and after delivering the bags, &c., which generally occupied about an hour, went to bed at an inn in *Newmarket*, in a bed hired for him exclusively for a year, and paid for by his master. He slept until about four o'clock in the morning, when the mail-coach arrived at *Newmarket* from *London*, and the pauper used to get up and receive the *Mildenhall* mail-bags, and drive his cart back to *Mildenhall*, where he generally arrived at about six o'clock. He then, after putting up his horse, &c., went to bed in a room provided for him in his master's house at *Mildenhall*, and slept two or three hours. He was employed during the rest of the day in *Mildenhall*, as his master chose, and sometimes, which was about eight or ten times in a month, he did not go to bed at all at *Mildenhall*. He kept all his clothes, and took all his meals in his master's house, and the room and bed in which he there slept were exclusively appropriated to him, and he considered that *Mildenhall* was his home, but that he took his night's rest at *Newmarket*. He kept no clothes, nor any thing else, at *Newmarket*, and other persons occasionally slept in the same room there with him. From the 5th of *April*, 1818, until the following 1st of *May*, he never drove the mail-cart at all, but lived wholly in his master's service at *Mildenhall*. On the 1st of *May*, 1818, he quitted Mr. *Bailey*'s service.

Dover and *Rolfe*, in support of the order of sessions. Here there was no question as to the validity of the hiring, nor the duration of the service. The only doubt

 is,

1820.

The KING *against* The Inhabitants of MILDENHALL.

is, where the pauper slept during the time. For the last twenty-five nights he slept wholly at *Mildenhall*, and during the other period he completed his night's rest at that place. The sleeping four or five hours in the middle of the night cannot be what is meant by the word pernoctavit, which is essential to the obtaining a settlement. *Rex* v. *Ringwood* (*a*). It might as well be contended that a mail-guard or coachman gains a settlement in each of the parishes through which the coach passes in the night.

Scarlett and *Chitty*, contrà. Here it is stated as a fact in the case, that the pauper considered himself as taking his night's rest at *Newmarket*, and the bed was there hired for him by the year, which is an important fact. If a servant's business be such as to compel him to sleep in a particular parish, no doubt he gains a settlement there, although his daily service be in another place. Here he slept substantially at *Newmarket*, and the rest he had at *Mildenhall* was after seven o'clock in the morning. If that were sufficient, a labourer who slept in one parish in the night might gain a settlement in the parish where he worked, if he slept there two or three hours during the day.

Per Curiam. Here the pauper was, by the nature of his service, compelled to wait a few hours in the middle of the night for the return of the mail. During that time he slept there; but that sleep was not his ordinary and sufficient rest, for after he returned to his master's house at *Mildenhall* he went to bed in his own

(*a*) 1 *M.* & *S.* 381.

room.

1820.

The KING against The Inhabitants of MILDENHALL

room, which was there provided for his exclusive use. He did not, therefore, go to *Newmarket* as to his place of rest, and unless that were so, he could gain no settlement there. Besides, it was for the respondents below to establish affirmatively a settlement in *Newmarket*; and if that is left doubtful, the Court will not quash the order of sessions. But here, in fact, *Mildenhall* appears to have been the place of rest of the pauper during his service. The order of sessions is therefore right.

Order confirmed.

The KING *against* The Inhabitants of BLEASBY.

Saturday, January 29th.

Where a pauper being settled by parentage in *A.*, at the age of 13 years hired and served for a year in *A.*, and afterwards, when he was 16 years old, returned to and lived with his father's family until he became of age: Held, that having acquired a settlement of his own in it, he did not follow the settlement of his father subsequently gained in another parish, whilst the pauper continued to reside with him.

WILLIAM KIRKHAM, with his wife *Catherine* and four children, was removed from *Bleasby* to *Thurgarton*, in the county of *Nottingham*, by an order of two justices dated 19th *January*, 1819. The sessions, on appeal, discharged the order, subject to the opinion of this Court on the following case:

The pauper was born at *Gonalstone*, the place of his father's settlement, in *June*, 1785; and at *Martinmas*, 1798, being then thirteen years of age, was hired and served for a year with *James Hind*, of *Gonalstone* aforesaid, farmer. When the pauper was about sixteen years of age, his father gained a settlement in *Thurgarton* by renting a tenement of the yearly value of 10*l.* on which the father continued to reside during the remainder of the pauper's minority, and the pauper continued during such period (that is, from about two years after the expiration of his service in *Gonalstone*, until he was twenty-one years of age,) to reside in his

 father's

1820.

The King *against* The Inhabitants of Bleasby.

father's house at *Thurgarton*, working during the time as a journeymen framework-knitter, and occasionally paying part of his earnings to his father who was a labourer, as a compensation for his board. The sessions being of opinion, that the pauper had gained a settlement in his own right in *Gonalstone*, by the hiring and service, and that the settlement gained about two years afterwards in *Thurgarton* by the pauper's father, did not vary or affect the settlement of the pauper, discharged the order.

Scarlett and *Balguy*, in support of the order of sessions. In this case, the pauper's settlement did not follow that of his father, because he had acquired a settlement of his own by hiring and service at *Gonalstone*. And the circumstance that at the time his father was also settled there, cannot make any difference. This is not like the case of a certificated person; there his family cannot gain settlements by hiring and service, unless emancipated, and undoubtedly it has been held, that a hiring and service, in order to emancipate, must be in a third parish, and that if it be in the certifying parish it will not do, *Rex* v. *Keel* (*a*), *Rex* v. *Ingworth* (*b*), *Rex* v. *Halifax*. (*c*) But this case is distinguishable altogether. Here the pauper, under the 3 *W.* & *M.* *c.* 11. gained a substantive settlement in his own right, which put an end altogether to his derivative settlement from his father. And even if the case be put on the ground of emancipation, it may be safely contended, that the pauper was emancipated; for the acquiring a settlement is distinctly stated by Lord *Kenyon* as one of the

(*a*) Cald. 144. (*b*) 8 T. R. 539. (*c*) Burr. S. C. 806.

 modes

1820.

The King
against
The Inhabitants of
Bleasby.

modes of emancipation, *Rex* v. *Witton cum Twambrookes.* (*a*)

Nolan and *Denman*, contrà. If a child be not emancipated but continues a part of its father's family, every new settlement acquired by the father, is also a new settlement acquired by the child. And, therefore, in the present case, if the pauper was not emancipated, the settlement in *Thurgarton* is his last legal settlement. Now, in order to constitute emancipation, there must be some deliberate act of separation on the part of the family. Marriage or separation, after twenty-one, or contracting a relation inconsistent, as in the case of the soldier are all deliberate acts of this description. To these, undoubtedly, Lord *Kenyon* adds in the case cited, the acquiring a settlement for himself. But this must be understood to be a settlement distinct from that of his family, for no other settlement could produce a separation. And in *Rex* v. *Collingbourn Ducis* (*b*), Lord *Kenyon* corrected his expression in this manner. Besides, in *Rex* v. *Keel* it was distinctly stated, that a party can acquire no new settlement in a place where he was settled before. If so, the hiring and service in this case gave none at *Gonalstone*, and then no doubt can remain on the point. In *Rex* v. *Roach* (*c*), it seems to have been taken for granted that if the soldier had returned into his father's family before twenty-one he would not have been emancipated. Here, after the hiring and service, the pauper returned and remained till twenty-one in his father's family, during which time the new settlement was gained by him. The contrary

(*a*) 3 *T. R.* 355. (*b*) 4 *T. R.* 199. (*c*) 6 *T. R.* 247.

1820.

The KING *against* The Inhabitants of BLEASBY.

decision would have a bad effect in separating families from each other.

ABBOTT C. J. I am of opinion that, in this case, the order of sessions should be confirmed. There are, undoubtedly, some consequences which will follow from this decision, which are to be regretted, but they are consequences arising from the system of the poor laws, over which the Court has no control. There is, however, another inconvenience, I mean the great frequency of legal controversies, which this Court can, in some degree, prevent, by not departing from the decisions of our predecessors who have left us, as it seems to me, an intelligible rule upon this subject. I take it to be settled law, that if a child acquire a settlement of his own, although he may afterwards, during his minority, return and live with his father's family, he does not follow the settlement of his father subsequently obtained. In this case the pauper did acquire a settlement by the hiring and service in *Gonalstone*; and after that time he derived his settlement no longer from his father, but from the contract of hiring. I cannot agree with what is stated in *Rex* v. *Keel* on that subject; and, indeed, the point was no part of the decision of the Court in that case. For the question, both there and in *Rex* v. *Ingworth*, was, whether a certificate was discharged by a hiring and service in the certifying parish, and the Court held, that it was not, on the ground, probably, that it was better to hold that no settlement gained in the parish granting the certificate, should affect the parish to whom it was granted, it not being a question into which the latter would be likely to enquire. Those cases are, however,

ever, very distinguishable from the present. I am, therefore, of opinion, that the order of sessions ought to be confirmed.

1820.

The KING *against* The Inhabitants of BLEASBY.

BAYLEY J. I am of opinion, that the cases relating to certificated persons ought to be wholly laid out of the question, in the present case. It has long been considered as a point settled by *Rex* v. *Witton cum Twambrookes* that the settlement by parentage only continues so long as the child remains a member of the family, and that the settlement of a child who has acquired one of his own does not shift with that of the father. Then the only question is, whether this pauper has done any act to gain a settlement of his own in *Gonalstone*. It is said that he has not, because he had a settlement there before, but the words of the statute of the 3 *W.* & *M.* expressly provide, that if an unmarried person shall so be hired and serve, he shall be judged and deemed to have a good settlement. It seems to me, that the statute having expressly provided this, the pauper who was hired and served a year in *Gonalstone*, did gain a settlement there, and that the order of sessions must, therefore, be confirmed.

HOLROYD J. I think that, in this case, the settlement of the son was not varied by the settlement of the father, subsequently obtained. The cases which have been cited with respect to certificates do not seem to me to be applicable to the present. I can see no reason why a party should not gain a new settlement in the parish in which he had one before, where originally he had it in another right, as derived from his father, and subsequently in his own right, under the contract of hiring and service. I therefore fully agree with the

1820.

The King *against* The Inhabitants of Bleasby.

the Court in thinking that this order ought to be confirmed.

Order confirmed. (*a*)

(*a*) *Best* J. was absent in the Bail Court.

Saturday, January 29th.

The King *against* The Inhabitants of Skeffington.

Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, and the master having consented to it, and all having agreed to part, the apprentice went away; but the indenture, which was in the hands of a third person, was never applied for nor given up: Held, that the apprenticeship was not put an end to by this agreement, although the master said that he would have given up the indenture if he had had it in his possession at the time, and afterwards refused to take back the apprentice.
Secondly, where an unstamped indenture of apprenticeship recited that a premium of 12*l.* had been paid; but added, that it was paid out of a charitable donation fund belonging to the parish, and the master being called, proved that the premium had been paid by the parish officers, who told him at the time of paying it that it was charity money: Held, that the fact of payment being proved, the recital in the indenture, and the declarations of the parish officers, were not admissible in evidence, so as to bring the case within the exception in the 44 *G.* 3. *c.* 98. *s.* 190., and that the indenture, being unstamped, was void. Semble, that a charitable donation fund belonging to a parish is a public charity, within such exception.

TWO justices, by their order, removed *Thomas Harrison*, and *Ruth* his wife, from the parish of *Halstead* to the parish of *Skeffington*, both in the county of *Leicester*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The respondents proved a hiring and service in *Skeffington* by the pauper *Thomas Harrison*, from *Martinmas*, 1812, to the following *Martinmas*. The appellants then gave in evidence an indenture of apprenticeship, dated 1805, by which the pauper bound himself apprentice to *William Dudgeon*, of the parish of *St. Mary*, *Leicester*, for the term of ten years. A premium of 12*l.* was stated in the indenture to have been paid to *Dudgeon* with him by the churchwardens and overseers of the parish of *Tugby*, which was also stated to have been paid by them out of a charitable donation fund belonging to that parish. No evidence, however, was given of the premium having been paid out of a charitable fund, except the above statement on the face of the deed, and the declaration

of

1820.

The King *against* The Inhabitants of Skeffington.

of the parish officers at the time they paid it, that it was charity-money. The deed was objected to as not having any stamp, but the objection was over-ruled. The pauper served under the indenture for four years in the parish of *St. Mary, Leicester*, when his mother applied to *Dudgeon* to give him up to her, she saying she had procured another master. The master said she might have him and welcome. They all agreed to part, and the boy went away with his mother. The indenture remained in the hands of the overseers of *Tugby*, and was never delivered either to the boy or his mother, nor applied for by any of the parties; but the master said he would have given it up if it had been at the time in his possession. The overseers of *Tugby* afterwards applied to *Dudgeon* to take the boy again; but he said he would not, adding, unless the magistrates make me take him again, I have done with him; and he never heard any thing more on the subject.

Denman, Marriott, and *Dwarris*, in support of the order of sessions, contended, that the indenture was void, inasmuch as a premium was paid, and no stamp was affixed to it, as required by 44 *G.* 3. *c.* 98. And there was no legal evidence that the premium was advanced out of any public charity, so as to bring the case within the exception contained in section 190 of that act. For if the recital in the indenture was sufficient, it would always be competent for the parties to make such a recital, and so to avoid the duty altogether. Nor was the declaration of the parish officers evidence which ought to have been received. Then, if so, the indenture being void ab initio, the pauper was sui juris when he hired and served in 1812 in *Skeffington*. But if not void ab initio, still the apprenticeship

was

1820.

The King *against* The Inhabitants of Skeffington.

was put an end to by the agreement, in 1809, between the mother and *Dudgeon*. If any thing short of absolute cancellation will do, this is sufficient; for the reason expressly assigned, for not giving up the indenture, was only that it was in the hands of a third party. And the master afterwards refused to take the boy again. And even if this was not so, then the subsequent service, in 1812, may be considered as a service with the permission of *Dudgeon*; and if so, a settlement would still be gained in *Skeffington*.

Gurney, *Phillipps*, and *Francklin*, contrà. The objection as to the want of a stamp arose and was answered by one and the same instrument. For if the recital be read to prove the payment of the premium, it must also be read to shew that that premium was advanced out of charity money. So, also, as to the declaration of the parish officer. That was a declaration accompanying the act of payment,* and qualifying it. Then, if so, *Rex* v. *St. Matthew's*, *Bethnal-green* (*a*) shews that this is a public charity within the exception. As to the other point, *Rex* v. *Bow* (*b*) is decisive to shew that the indenture was not put an end to, and *Rex* v. *Harberton* (*c*) is to the same effect. Then the apprentice was not sui juris in 1812, when the hiring and service took place; and, therefore, gained no settlement in *Skeffington*.

Abbott C. J. If it had been shewn in the present case, that this apprenticeship had ever been well constituted, I should have been of opinion, upon the authority of the case of *Rex* v. *Bow*, which has been cited here, that the agreement between the parties in this case was not sufficient to put an end to the indenture. I think,

(*a*) *Burr. S. C.* 574. (*b*) 4 *M.* & *S.* 383. (*c*) 1 *T. R.* 139.

also,

1820.

The King *against* The Inhabitants of Skeffington.

also, that the fund out of which the premium is said to have been paid, was a public charity within the meaning of the exception in the stamp-act. But I think that there is no sufficient evidence in this case to shew that the premium was in fact paid out of such a fund. It is stated in the case, as a fact proved by the master, that a premium of 12*l.* was paid with the apprentice. That being so, it would be very dangerous to say that the declaration of the parish officers should be admitted to prove the nature of the fund out of which it was paid, more especially when those persons might have been called to prove the fact. The case is not precisely the same as if a declaration of the parish officers had been offered as the only proof of payment. In that case the whole declaration would have been receivable. But here the fact of payment was itself proved. Upon that ground I am of opinion that the indenture ought not to have been received in evidence; and, therefore, that the sessions had nothing before them to shew that the pauper was not sui juris at the time when he served for a year in *Skeffington.* The order of sessions must, however, be confirmed, because their ultimate decision, although founded on wrong grounds, was correct.

Bayley J. I am entirely of the same opinion. The respondents having proved a case of hiring and service, it became the duty of the appellants to shew that there was, at the time, a subsisting valid apprenticeship. In order to do that, they produce an indenture, which, on the face of it, purports that a premium has been paid, and which is not stamped. Now, if that premium was paid out of a public charity, it was

1820.

The King *against* The Inhabitants of Skeffington.

the duty of the appellants to prove that fact, which was within their knowledge, and of which the respondents could know nothing. An indenture of apprenticeship is no evidence of the facts recited in it. If it were, the inconvenience pointed out in argument would occur, that in order to defraud the revenue a party might always recite that the premium was paid out of a public charity, whether the fact were so or not. But it is said that if the payment of the premium be proved by the indenture, this recital also becomes evidence. That answer is not, however, sufficient; for it is plain upon this case, that, independently of the indenture, there is direct evidence of the fact of payment. I think, therefore, that on the evidence this was a void indenture.

Holroyd J. If the recital in the indenture of apprenticeship, and the declaration of the parish officers, had been the only evidence of the fact of payment of the premium, I should have been of opinion that there was sufficient evidence also, that it was paid out of a public charity. But, on looking at this case, it is clear to me that that fact was proved substantially by the master. If so, the sessions decided wrong in receiving the indenture in evidence without a stamp. Their ultimate decision was, however, right, for they confirmed the order.

Order of Sessions confirmed. (*a*)

(*a*) *Best* J. absent in the Bail Court.

1820.

HANLEY, Esq. *against* PEPPER.

Tuesday, February 1st.

Where an innkeeper resides at his inn in the district *A.*, and his stables are in the district *B.*, his residence is the criterion by which to ascertain the district where he is to take out his licence, and to account for the post-horse duties under 27 *G.* 3. *c.* 26. *s.* 13.

ASSUMPSIT by plaintiff, as farmer of post-horse duties for *Hertfordshire*, against defendant, a person licensed to let horses for travelling post, for duties payable by him. There was also a count for money had and received. Plea, general issue. At the trial, before *Abbott* J., at the sittings after *Trinity* term, 1818, a verdict was found for the plaintiff, damages 5*s.*; subject to the opinion of this Court, upon the following case:

The plaintiff was the farmer and collector of the post-horse duties for the county of *Herts*, and the defendant was a person licensed to let to hire horses, for the purpose of travelling post by the mile, or from stage to stage, under a licence from other persons, who were farmers and collectors of the like duties, in the county of *Middlesex*. At the time in question, the defendant kept the *Commercial Inn*, at *Barnet*, and resided there with his family. The inn is in the county of *Herts*. On the other side of the road, and in the county of *Middlesex*, he held stables and other buildings, in a yard, where he kept all his horses for hire, and where the ostler and his wife resided, by whom the stamp-office and posting-tickets were constantly filled up, and sent from the yard with the horses and chaises, when hired or ordered by any customer. The chaises were all returned to the assessed taxes, and the assessed duties upon them were paid in the county of *Herts*. Up to the 1st *October*, 1817, the defendant took out an annual licence from the collector for the county of *Herts*,

who

1820.

HANLEY *against* PEPPER.

who was then also collector for *Middlesex*; and, under such licences, paid the post-horse duties to the said collector, up to that time. The districts then becoming separated, he took out a new licence from the farmer and collector for the county of *Middlesex*; and, since that time, all the stamp-office tickets issued by the defendant, with horses, have been supplied to him by the farmer of the district in which *Middlesex* is included. He was applied to on the part of the plaintiff, as farmer of the duties for *Herts*, on the 25th of *February*, 1818, who asked the defendant if he had taken out a licence for *Herts*; he said he had taken out a licence for *Middlesex*, as his horses stood there, and should account for the duties to the farmer of *Middlesex*, and not to the farmer of *Herts*. On the 8th of *March*, 1818, *John Hills*, a guest of defendant, in the *Commercial Inn*, in the traveller's room there, which is in the county of *Herts*, ordered of the defendant a chaise and pair of horses, to be used by the said *John Hills* in travelling from thence to *St. Alban's*; and defendant, previously to the using of the said horses, charged the amount to the said *John Hills*. The said chaise and horses having been put to at the stables in *Middlesex*, and a stamp office ticket for them filled up there by the ostler, were driven up to the door of the inn, on the *Hertfordshire* side of the road, and there took up the said *John Hills*, and carried him to *St. Alban's*. The hiring by *Hills* was made at the instance and expence of the plaintiff in this action. The defendant had notice on the 12th of *March*, 1818, to pay, on the 25th of the same month, to the plaintiff, as such farmer and collector, the duties upon the aforesaid hiring; but refused so to do, contending that it belonged to the farmers for

the

the county of *Middlesex*, to whom he accounted for the same.

Bayly for the plaintiff. It might, perhaps, be contended, that in this case, the defendant has not acted bonâ fide in removing his horses into *Middlesex*; but, without doing that, it is clear from 44 *G.* 3. *c.* 98. *sched. B.*, by which the duty is imposed, that the place of residence is to be the criterion. Now, in this case, the residence was in *Hertfordshire*, where the traveller commenced his journey. And this is confirmed by 25 *G.* 3. *c.* 51. *s.* 15.; for the innkeeper, who issues the stamp-office ticket, is required to put on it the name of his house or sign. The 27 *G.* 3. *c.* 26. *s.* 13. does not vary the case: that only provides, that the duty shall be payable where the ticket is issued, and the innkeeper issuing it resides. It therefore clearly contemplates, not an issuing by the ostler, but by the innkeeper. If so, the ticket in this case was issued in *Hertfordshire*, where the defendant also resided.

Marryatt contrà. Here, the defendant, who has taken out his licence from the *Middlesex* collector, ought to account for the duties to him, and he has done so. The provisions of 25 *G.* 3. *c.* 51. are immaterial to the present case; for, at that time, no questions could arise between different collectors, and therefore it was of no consequence, provided the duties were paid, in what place they were accounted for. But the 27 *G.* 3. *c.* 26. *s.* 13. was passed for the purpose of regulating the matter, and provides, that the duty shall be payable where the tickets are issued. Here, that is done in *Middlesex*; for they are made out there, and there

 deliver-

1820.

Hanley *against* Pepper.

delivered to the post-boy, who is, for that purpose, the agent of the traveller. Suppose a livery-stable keeper resides at a distance from his place of business, and does not keep an inn, it is clear he must account to the district where his stables are, and that case is not distinguishable from this. Here, the defendant's place of business for posting is in *Middlesex*. As to any fraud or collusion, it is wholly out of the case.

Abbott C. J. It appears to me, that by the true construction of this act of parliament, the site of the residence of the party, and not that of his stables, is to determine the district in which he is to take out his licence, and where the duties are to be payable. By the 25 *G.* 3. *c.* 51. s. 8. a separate and distinct licence must be taken out for each and every inn, house, or other place, which any postmaster or other person shall keep for the purpose of letting horses for hire by the mile or stage; and if, therefore, the construction contended for by the defendant were correct, it would follow, that a person who resided near the junction of two counties, and who had two stables, one in each county, would be compellable to take out two licences, and it would be incumbent upon him to pay the duties to the collectors of the one or the other county, according as the horses came out of one or the other stable. Now, all this confusion of accounts will be avoided by taking the residence of the innkeeper as the criterion by which to determine the district where the licence is to be taken out, and the duties payable. The words of the 27 *G.* 3. *c.* 26. *s.* 13. are, that the duties shall belong to the district where the tickets shall have issued, and where the postmaster issuing the same shall reside. It

1820.

HANLEY *against* PEPPER.

is said, indeed, that the tickets were issued where they were made out by the ostler, viz. in *Middlesex*; but I do not agree to that, for I think they were issued by the defendant in *Hertfordshire*, where he delivered them to the traveller. I think, therefore, that the plaintiff is entitled to the judgment of the Court.

BAYLEY J. I am of the same opinion. If this had been a case where a party had stables for letting horses, and resided elsewhere, his residence not being a place of public entertainment, perhaps I might be of opinion that the site of the stables would determine the district where the duties were payable. But, in the present case, I have no doubt that the stable-yard of the defendant in *Middlesex* was not the place where he let the horses, and where he ought to have paid the duties, and that his residence on the opposite side of the road was so. This seems to me quite clear from the provisions of the 25 *G.* 3. *c.* 51., by the 15th section of which the post-horse duty is imposed on the traveller, and the person letting out the horses is to deliver to him a stamp-office ticket, which the traveller is to leave at the first toll-bar; and the 17th section, alluding to this provision, speaks of it as the ticket by this act directed to be issued to such traveller. Now, this seems to me to explain the phrase used in 27 *G.* 3. *c.* 26. *s.* 13., upon which this question turns. That clause provides, that the duties shall belong to the district where such tickets shall have issued, and where the innkeeper issuing the same shall reside. Now, here, the innkeeper resides in *Hertfordshire*, and if, as appears in the clause referred to in 25 *G.* 3. *c.* 51., the issuing of the ticket means the delivery of it by the

 inn-

1820.

HANLEY *against* PEPPER.

innkeeper to the traveller, that also appears from the case to have taken place in *Hertfordshire.* I think, therefore, there must be judgment for the plaintiff.

HOLROYD and BEST Js. concurred.

Judgment for plaintiff.

Friday, February 4th.

CAMPBELL *against* LEWIS. In Error.

Where *A.* being possessed of certain premises for a term of years, assigned part of them over to *B.* for the residue of his term, with a covenant for quiet enjoyment, and *B.* afterwards assigned them over to *C.*: *Held,* that *C.* having been evicted by *J. S.,* the lessor of *A.,* for a breach of covenant committed by *A.* previously to the assignment to *B.,* might maintain an action against *A.* upon the covenant for quiet enjoyment, on the ground that there was a privity of estate between *A.* and *C.*; secondly, the declaration having set out the indenture from *A.* to *B.,* in which it was recited that *J. S.,* by indenture, demised to *A.* the premises, and it afterwards appearing on the face of the declaration, that *J. S.* had entered and ejected *C.* from the premises for a forfeiture: Held, that the Court might, particularly after verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact. Thirdly, when part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, it is to be presumed, after verdict, that the jury were directed at the trial not to take that part into their consideration.

THE declaration set out an indenture, dated *November* 1st, 1803, between the plaintiff in error and *Benjamin Corp,* whereby, after reciting that by indenture, dated *January* 1*st,* 1801, *James Barclay* demised to the plaintiff in error, his executors, administrators, and assigns, certain tenements at *Totteridge,* to hold from 25th *March,* 1800, for the term of 21 years next ensuing, at the yearly rent of 70*l.* And that *Corp* had agreed with plaintiff in error for the absolute purchase of a part of the premises so demised for the residue of his term in them for the sum of 420*l.*; in consideration of which plaintiff in error had agreed to pay the rent of 70*l.,* and all further rents that should become payable to *Barclay,* and to indemnify *Corp,* his executors, administrators, and assigns, therefrom; it was witnessed, that plaintiff in error did bargain, sell,

assign,

1820.

CAMPBELL *against* LEWIS.

assign, and set over to *Corp*, his executors, administrators, and assigns, certain tenements, being part of those demised by *Barclay* to him, to hold during all the residue and remainder of the said term of 21 years, *with a covenant for quiet enjoyment.* The declaration then stated that *Corp* entered upon the said assigned premises; and being thereof so possessed, by indenture, dated *January* 2d, 1804, assigned them over to defendant in error, who entered and became possessed thereof. And then, after averring performance by defendant in error of all things on his part to be performed, it was stated, as a breach of the covenant for quiet enjoyment, that *Barclay*, on the 11th *August*, 1811, had entered and ejected the defendant in error from the premises, for a forfeiture of the same premises before then committed by plaintiff in error by a breach of covenant contained in the indenture dated *January* 1st, 1801. It then alleged, as special damage, that defendant in error not only lost the use of the premises so assigned, and was obliged to lay out divers large sums of money in endeavouring to defend his possession thereof, but that he had also *lost divers large sums of money expended in and about the altering, improving, and ornamenting the same premises.* The plaintiff in error pleaded, first, non est factum as to the indenture dated *November* 1st, 1803; secondly, a similar plea to the indenture dated 2d *Jan.* 1804; thirdly, that *Barclay* had not entered upon the assigned premises, and ejected defendant in error therefrom; fourthly, that *Barclay* had ratified the title of defendant in error, and that defendant in error had peaceably and quietly enjoyed the premises; and, fifthly, that defendant in error had, ever since the supposed forfeiture, enjoyed the pre-

 mises

1820.

CAMPBELL against LEWIS.

mises by the licence of *Barclay*. All these issues having been found for the defendant in error, the damages were assessed by the jury generally at 300*l.* The case was argued in the Court of Common Pleas, and that Court held that the action was maintainable. (*a*) Whereupon a writ of error was brought.

Hullock Serjt., for the plaintiff in error. This action can only be sustained on the ground either that there was a privity of contract between the parties, or a privity of estate. There is no privity of contract; for that only exists with the party with whom the contract is made, and was put an end to by the assignment from *Corp* to *Lewis*. In *Isherwood* v. *Oldknow* (*b*) Lord *Ellenborough* seems to have been of opinion, that, at common law, an assignor could not in such a case maintain covenant; and *Thursby* v. *Plant* (*c*), *Thrale* v. *Cornwall* (*d*), *Barker* v. *Damer* (*e*), and *Webb* v. *Russell* (*f*), are to the same effect. And it is clear that under 32 *H.* 8. he cannot maintain the action, because the plaintiff in error is not the assignee of the reversion. Then is there any privity of estate? The case of *Middlemore* v. *Goodale* (*g*), is distinguishable. There it was a conveyance in fee from *A.* to *B.*, with a covenant for further assurance; and it was held that the assignee of *B.*'s assignee, might maintain covenant against *A.* But there the inheritance passed by assignments, here only a chattel interest. For a term in land and a personal chattel are the same in law; and the question is, whether

(*a*) 3 *B. Moore*, 35.
(*b*) 3 *M. & S.* 382.
(*c*) 1 *Saund.* 230.
(*d*) 1 *Wils.* 165.
(*e*) 3 *Mod.* 336.
(*f*) 3 *T. R.* 401.
(*g*) *Cro. Car.* 503.

there

1820.

CAMPBELL against LEWIS.

there is not a great difference between the assignee of the inheritance and the assignee of a term. It is said, also, that *Noke* v. *Awder* (*b*) is precisely in point. But it does not appear, that the attention of the Court was there called to this point; and it is too much to say, that if there had been any thing in it, it would have been argued in that case. There is no allegation in this declaration that *Barclay* had any title. It is true, that in the assignment from *Campbell* to *Corp*, it is recited, that he had demised; but that would only make the assignment by *Campbell* to *Corp* good by estoppel, and an assignee, by estoppel, cannot assign over. This was ruled in *Noke* v. *Awder*. Then if so, the defendant in error is not such an assignee as is entitled to maintain covenant. Then, as to the special damage, part of it does not fall within the covenant supposed to be broken; and as the jury have assessed general damages, it is erroneous. [*Abbott* C. J. The whole declaration consisting of one count, is it not, after verdict, to be presumed, that the Judge directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken?]

Bosanquet Serjt., contrà. It may be admitted, that this action is not, either at common law or by 32 *H.* 8., maintainable on the ground of a privity of contract; but it is clearly maintainable on the ground of a privity of estate. He was then stopped by the Court.

ABBOTT C. J. It appears to me, very clearly, in the present case, that the action is maintainable, upon the

(*a*) *Cro. El.* 373. 436.

1820.

CAMPBELL against LEWIS.

ground of the privity of estate. It was decided, in *Middlemore* v. *Goodale*, where a party grants an estate in fee, with a covenant for further assurance, and his grantee grants it over to *A.*, that *A.* may maintain covenant against the original grantor, on the ground that a privity of estate subsists between them. Now I think, that there is not any difference between that case and the present, and my opinion upon this point is confirmed by *Noke* v. *Awder*, where the question arose upon a chattel real, and no such distinction seems to have occurred to the very learned persons who argued and decided that case. It has been argued here, that the declaration is defective, on the ground that there is no allegation that *Barclay* had any title to the premises; and, in support of this, *Noke* v. *Awder* was referred to. In that case, the plaintiff, in the result, was barred of his action, because it appeared, from his own shewing, that *King*, the original lessor had no title; and it was contended there, that the plaintiff was in this dilemma, either that, in consequence of the want of title in the original lessor, nothing passed by the defendant's grant, except by estoppel; and that a lessee, by estoppel, could not assign over to the plaintiff, or that the eviction by the stranger was wholly unlawful, in case the original lessor had a title, and then there was no breach of the covenant. But in this case, the eviction is not by a stranger, but by *Barclay* himself; and there is every circumstance from which we must presume that *Barclay* had title. I am of opinion, therefore, that this judgment must be affirmed.

BAYLEY J. It is not a valid objection, particularly after verdict, that *Barclay's* title is not formally set out

in

1820.

CAMPBELL *against* LEWIS.

in the declaration. For the assignment by the plaintiff in error to *Corp* is primâ facie evidence, that the lease granted by *Barclay* was valid; and, in addition to this, it appears, that *Barclay* entered and evicted the defendant in error. The case would have been different if it had appeared, distinctly, that *Barclay* had no title to the land. But there is a great difference between the absence of any assertion of title, and a negation. Upon the other question, as to the privity of estate, I am clearly of opinion that *Middlemore* v. *Goodale*, and *Noke* v. *Awder*, are authorities to shew, that such a covenant runs with the estate to which it relates, whether it be an estate in fee or for a term of years. I am of opinion, that this judgment should be affirmed.

HOLROYD J. I am of opinion that this action is maintainable upon the covenant, whether any estate remain in the covenantor or not; for it is a covenant running with the land. It is said, that in this case, it does not appear that *Barclay* had any title; and if so, that the lease by *Campbell* to *Corp* was only good by estoppel. But I do not agree with that; for it seems to me, upon the facts stated on the record, that *Barclay* had a good title. It is true, that the defendant in error may take advantage of the estoppel; but he does not take by estoppel but by estate. I think the judgment of the Court of Common Pleas was right, and ought to be affirmed.

Judgment affirmed.

BEST J. gave no opinion, having been engaged as counsel in the cause.

1820.

Friday, February 4th.

BUTLER *against* WILDMAN.

The captain of a *Spanish* ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured: Held, in an action upon a policy of insurance upon *Spanish* property, subscribed by *British* underwriters, who, at the time of effecting the policy, knew that the assured were *Spaniards*, and that *Spain* was at war with the state to whom the capturing vessel belonged, that this was a loss by jettison, that term, in a policy of insurance, signifying any throwing overboard of the cargo for a justifiable cause; secondly, that it was a loss by enemies; and thirdly, if not by jettison, in the strictest sense, that it was something of the same kind, and therefore came within the words "all other losses and misfortunes."

DECLARATION upon a policy of insurance on dollars at and from *Cadiz* to any port or ports in *Cuba*, and from thence to *La Guiara*. The policy was in the common form, and described the perils insured against to be of the seas, men of war, fire, enemies, pirates, rovers, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come, to the hurt, detriment, and damage of the said goods and merchandizes, and ship, &c. or any part thereof. The declaration, after stating the promise and the subscription of the policy, and the loading of the dollars, averred that one *Joze Dieze Ymbrechts*, a subject of the king of *Spain* was interested in the dollars insured, and also that *Lopez*, the commander of the vessel was a subject of the king of *Spain*, and that before, and at the time of effecting the policy, and of the loss, open war was waged between the king of *Spain*, and certain persons exercising the powers of government in parts beyond the sea, viz.: in parts of *South America*, formerly belonging to and constituting part of the dominions of the king of *Spain*, of all which said several premises, the defendant, at the time of effecting the policy, had

notice.

1820.

BUTLER *against* WILDMAN.

notice. It then stated, that while the ship was in the course of her voyage, an armed vessel proceeding from and manned with part of the crew of a ship of war carrying a letter of marque from and acting under the authority of the persons so exercising the powers of government in the parts of *South America* aforesaid, made up to the said ship in the said policy mentioned for the purpose of attacking the same, and afterwards did attack and capture the said ship, whereby the said ship became wholly lost to the proprietor thereof; and that just before the said armed vessel did attack and capture, and while she was preparing to attack the said ship, in the said policy mentioned, the said *Joze Lopez*, the said commander thereof, in order to prevent the dollars from falling into the hands of the persons so on board the said armed vessel, and so acting under the authority of the persons so exercising the powers of government in the said ports of *South America* aforesaid, then and there cast and threw into the sea a certain large quantity, to wit, 100,000 of the said dollars in the said policy of insurance mentioned, whereby the same became wholly lost to the proprietor thereof. To this declaration there was a general demurrer, and it was now argued by

Campbell, in support of the demurrer. The declaration in this case is insufficient, because it does not shew that the capture of the ship was inevitable at the time when the dollars were thrown overboard. It is not stated that any resistance was made, or that there were no means of resistance. Assuming, however, that the declaration is sufficient in point of form, the facts stated do not constitute a loss within the policy. It is not a

loss

1820.

Butler *against* Wildman.

loss by jettison, for that term only comprehends the case of throwing overboard a part of the cargo for the sake of preserving the remainder and the ship; that is the sense in which it is considered by all writers on maritime law. *Emerigon Traité des Assurances*, *c.* 12. *s.* 40., where numerous authorities from other foreign writers are collected, considers jettison in that sense only, even when he is treating of it as the subject of a loss within the policy. Secondly, This is not a loss within the meaning of the term *enemies*, because it does not proceed immediately from any act done by enemies, but from an act done by the captain under the influence of fear, and the effect of considering this as a loss within the policy will be to increase the risk of the underwriter, by depriving him of the chance of re-capture. *Emerigon*, indeed, *c.* 12. *s.* 17., lays it down, that if the captain burns his ship, in order to prevent it falling into the hands of the enemy, when capture is inevitable, that is a loss within the policy, but in the cases put by him the loss proceeded immediately from fire, one of the risks enumerated in the policy, and the assured and assurers were members of the same state, and had a common interest in preventing property from falling into the hands of the enemy. Thirdly, This is not a loss within the words "all other losses or misfortunes;" for those words can only comprehend losses *ejusdem generis* with those described in the enumerated risks: here, the immediate cause of the loss was the act of the captain induced by fear, and it is not, therefore, of the same description with any of the causes of loss described in the enumerated risks. In the course of the argument, *Hadkinson* v. *Robinson* (*a*), *Hunter* v. *Potts* (*b*), *Rohl* v. *Parr* (*c*), were cited.

(*a*) 3 *Bos.* & *Pul.* 388. (*b*) 4 *Campb.* 203. (*c*) 1 *Esp. N. P.* 444.

Barnewall

Barnewall, contrà, was stopped by the Court. 1820.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. The defendant, upon this general demurrer, has taken two objections, one to the form of the declaration in which the loss is stated; the other, that this is not a loss within the policy. Now, the declaration states the loss thus, that whilst the said ship was proceeding on her voyage, a certain armed vessel proceeding from and manned with part of the crew of a certain ship of war, carrying a letter of marque from and acting under the authority of the persons so exercising the powers of government in the parts of *South America* aforesaid, made up to the said ship, in the said policy mentioned, for the purpose of attacking the same, and afterwards did attack and capture the said ship, whereby the said ship became wholly lost to the proprietor thereof. Now, supposing the declaration had stopped here, and the dollars had remained on board, this would clearly have been a good averment of a loss by capture. The declaration then proceeds to state that just before the said armed vessel did attack, and whilst she was preparing to attack the said ship in the said policy mentioned, the said commander thereof, in order to prevent the dollars insured by the said policy from falling into the hands of the persons so on board the said armed vessel, then and there cast and threw into the sea, a certain quantity of the same, &c. Now, taking the whole allegation together, it appears, that at the instant when the ship was captured, these dollars were thrown overboard by the master. It is not, indeed, in terms, alleged that this was necessary to be done; but I think we must so understand it; and, at

any

1820.

BUTLER *against* WILDMAN.

any rate, that is an objection which could only prevail upon special demurrer. If, indeed, the dollars had been thrown overboard by the master, and the ship had been subsequently re-captured, it would be a question for the jury, under the circumstances, to say whether he was justified in what he did. I think, therefore, that the loss is sufficiently stated. Then the question arises, whether this be a loss for which the underwriters are liable. I am of opinion that this is a loss by jettison, or if not, strictly speaking by jettison, it is something ejusdem generis, and therefore falls within the general words, "all other losses or misfortunes, &c." Jettison, in its largest sense, however, signifies any throwing overboard; but, in its ordinary sense, it means a throwing overboard for the preservation of the ship and cargo, and most of the jurists treat of it in this sense, under the head of general average. The present case is an extraordinary species of jettison. I cannot, however, distinguish it in principle, from the case where the captain sets fire to his ship to prevent her falling into the hands of the enemy. Now it is laid down, by *Emerigon* and *Pothier*, that the underwriters are liable for such a loss; and I think, therefore, they are equally so in the present case. It is said, however, that in those cases, the assured and underwriters were all of the same nation; so long, however, as the insurance of the property of a foreigner is not contrary to the law of *England*, the underwriter who insures, must be considered as placing himself in the same situation as the foreigner; for he has undertaken to indemnify the assured against enemies, and that must mean enemies of the state of which the assured is a member. I am, therefore,

therefore, of opinion, that the plaintiff is entitled to the judgment of the Court.

BAYLEY J. I am of the same opinion. If the dollars had not been thrown overboard, it is clear that they would have fallen into the hands of the enemy, for the ship was, in point of fact, taken; and if the loss here stated had been declared upon as a loss by jettison or by enemies, or within the concluding words all other losses and misfortunes, the facts stated would have supported that averment. Jettison, in its largest sense, means any throwing overboard. In the passage cited from *Emerigon*, he is treating of jettison with reference to cases of general average, where jettison is used in a confined sense. But its true meaning, in a policy of insurance, seems to me to be any casting over board ex justa causa. Now was that so here? The circumstances are these. This was a *Spanish* ship, and the property insured was *Spanish*, and there was a war between *Spain* and her colonies. It was, therefore, the duty of the master, who was a *Spanish* subject, to prevent any thing which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, ex justa causa. It seems to me, therefore, that this is a loss by jettison. But if it be not a loss by jettison, it is a loss by enemies. It clearly falls within the principle stated by *Emerigon*, in the case of the destruction of the ship by fire; and I think the enemy was the proximate cause of loss. In point of principle, there is no distinction between this and the case of a ship burnt, to prevent its falling into the

hands

1820.

Butler *against* Wildman.

hands of the enemy, and I can see no solid distinction between the ship and cargo. The cargo, which, in this case, was money, becomes immediately convertible to hostile purposes. But, assuming that this was not strictly jettison, it is something ejusdem generis, and may, therefore, be comprehended within the words "all other losses and misfortunes." In *Cullen* v. *Butler* (a), a *British* ship of war mistaking a *British* trading vessel for an enemy, fired into and sunk her. It was contended, that this not being a cause of loss described in any of the enumerated risks, was not within the policy; and *Hadkinson* v. *Robinson*, *Hunter* v. *Potts*, and *Rohl* v. *Parr* were cited. The Court, however, were of opinion, that it was a loss within the meaning of the words "all other losses and misfortunes." I think, that the facts stated in this case, constitute a loss within the meaning of those words. The judgment must, therefore, be for the plaintiff.

Holroyd J. I think that this is a loss within the policy, and by jettison, for the reasons already given by the Court, although it be not that species of jettison which would be the subject of general average. It seems to me, also, that it is a loss by enemies; for the meditated attack was the direct cause of the loss. Suppose that the cargo, instead of being dollars, had been gunpowder, or other ammunition, and that, instead of having been thrown overboard, a part had been consumed, in resisting the attack of the enemy, that would clearly be a loss by enemies; and I cannot

(a) *Michaelmas* term, 57 *G.* 3., not yet reported.

dis-

1820.

BUTLER against WILDMAN.

distinguish that case from this. (a) If we were to hold that this were not a loss within the policy, we should hold out a temptation to the captain of a vessel, even with warlike stores on board, rather to suffer them to fall into the hands of the enemy, than to sacrifice them in this manner. It seems to me, therefore, that we ought to hold this to be a loss, for which the underwriters are liable. I think that this is a loss by jettison or by enemies; and also, that it comes within the words "all other losses and misfortunes," which include all losses of the same nature with those described in the enumerated risks.

BEST J. This question is new in the courts of this country. In the absence of all authority, we must put that construction upon the contract of assurance which is most agreeable to justice. French policies are nearly similar to those used in this country. As learned *French* writers and the tribunals of *France* have put a construction upon their policies, in cases like the present, we may avail ourselves of their opinions and decisions, to assist us in deciding on the

(a) A loss by jettison, even in its confined sense, viz. where goods are thrown overboard in a storm, for the sake of preserving the ship and the remainder of the cargo, is usually declared upon as a loss by perils of the sea; yet, in that case, it might be urged that the loss proceeded immediately from the act of the captain, and that the underwriter was thereby deprived of all chance of the property being saved, which might be the case if the storm had suddenly abated. If jettison, therefore, be a loss by perils of the sea, the loss stated in this declaration must equally be a loss by enemies. A common carrier is liable for all losses, except those proceeding from the act of GOD, or the king's enemies. The throwing overboard of goods in a storm to preserve the lives of passengers, has been held to be a loss proceeding from the act of GOD so as to excuse the carrier. See the *Gravesend Barge* case. (1)

(1) 1 *Roll. Rep.* 79.

1820.

BUTLER *against* WILDMAN.

policy now under our consideration. *Pothier*, in his Treatise on the Contract of Insurance, *c.* 1. *s.* 2., *ar.* 2. gives the description of general risks in these words: "Seront aux risques des assureurs toutes pertes et dommages qui arriveront sur mer et generalement toutes fortunes de mer." This learned writer, in the next page of his valuable work, states, that, in his opinion, the underwriters are responsible for such a loss as that which is sought to be recovered in this case. It appears also from *Emerigon* (*a*), that there are decisions of the courts of *France*, pronounced by the parliaments of *Bourdeaux* and *Provence*, on appeals from inferior tribunals, which expressly confirm the opinion of *Pothier*. In these cases, the assured and underwriters were subjects of the same country, but this circumstance appears to me to make no material difference. The defendant knew that the assured was a *Spaniard*, and that there was war between her and her colonies, and the insurance is against enemies. The underwriter must have presumed that the assured would act as became a good subject of the country to which he belonged, and it was the duty of a loyal *Spaniard* to prevent money from falling into the hands of the enemies of *Spain*. This loss comes within the general words of the policy. The use of these words is, to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near, but not precisely within the specified losses. Thus one of the losses particularly specified, is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy, (although it may

(*a*) *Emerigon*, 434.

be

1820.

BUTLER *against* WILDMAN.

be observed that such a loss would fall within the other words, takings at sea, men of war, letters of mart and countermart;) the general words, however, afford a complete answer to such an argument, by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss, in the present case, is the consequence of one of those justifiable acts. Dollars, we have been told, are not warlike stores, but they will afford the readiest means of procuring every instrument of war. It has been said, also, that this act of the captain deprived the underwriter of the chance of re-capture. As the event has shewn that his conduct was not the effect of a vain fear, but of a resolution wisely and and honestly taken, he was justified in doing what he did, and the underwriters have no right to object, although they might have been placed in a less advantageous situation than they otherwise would have been in. It is objected, that *British* underwriters ought not to be made to pay for *Spanish* patriotism; but they must be liable to these payments, if they insure *Spanish* ships against enemies, when *Spain* is engaged in war. For these reasons, I am of opinion, that judgment should be given for the plaintiff.

Judgment for the Plaintiff.

LLOYD *against* PEELL.

Friday, February 4th.

A ple[illegible] [illegible]f a discharge [illegible] [illegible]ler the ins[illegible] [illegible]nt debtors [illegible] [illegible]t is no bar [illegible] [illegible]n action of [illegible] [illegible]pass for mes[illegible]e profits, ev[illegible] though accruing before the discharg[illegible]

TRESPASS for mesne profits, from *July* 2d, 1817, to *January* 2d, 1819: plea, that defendant was, on the 1st of *May*, 1819, duly discharged under the 53 *G.* 3. *c.* 102. (the insolvent debtors' act,) from the

pre-

1820.

LLOYD *against* PEELL.

premises in the said declaration mentioned, and from the demand of the plaintiff. Demurrer and joinder: when the case was called on, the Court called upon

Ballantine to support his plea. He contended, that it was competent to the defendant, under the insolvent debtors' act, to admit in his schedule the plaintiff's demand for mesne profits, and so to be discharged from it, the whole demand being at the time due; and it is in the nature of a debt rather than a tort.

Per Curiam. The insolvent act only discharges the debtor from the debts due by him to those who are or who claim to be his creditors, at the time of his discharge; but here, the plaintiff was neither the one nor the other at the time of the discharge, for he only claimed damages due for a wrong done to him. Those damages do not constitute a debt till judgment for them has been obtained.

Judgment for plaintiff.

Hutchinson was to have argued in support of the demurrer.

Friday, February 4th.

HAMMOND *against* TAYLOR.

An arrest in the city of *London* on a bill of *Middlesex* is irregular, even though it took place on the verge of the county of *Middlesex*, if there be no dispute as to the boundaries.

D. *F. JONES* had obtained a rule to shew cause why the bail-bond taken in this case should not be delivered up to be cancelled, upon the defendant filing common bail. It appeared that the defendant was arrested in *Peter Street*, in the city of *London*, upon a bill of *Middlesex*.

Gaselee

1820.

HAMMOND *against* TAYLOR.

Gaselee shewed cause on an affidavit, which stated that *Peter Street* was on the verge of the county of *Middlesex*; and also, that the defendant had, by a conversation with the sheriff's officer, waived the irregularity.

Jones, contrà, contended, that it being admitted that there was no doubt as to *Peter Street* being in the city of *London*, it was immaterial whether it was on the verge of the county of *Middlesex* or not. Here the sheriff was a trespasser, and ought not to take advantage of his own wrong. In *Chase* v. *Joyce* (*a*), the Court distinguish between bailable process and that which is not so, and say that there never was a doubt but that the latter must be served in the county; and as to the waiver, the defendant cannot waive an advantage to which his bail are entitled.

Per Curiam. This arrest was irregular, and therefore the rule must be absolute; for otherwise the bail, who may perhaps have entered into the bail-bond, being aware of this irregularity, would be prejudiced, and there is no waiver on their part. There being no dispute as to the boundaries, it is not of any importance that this was an arrest on the verge of the county of *Middlesex*. Under the circumstances of the case, however, the rule should be made absolute without costs.

Rule absolute.

(*a*) 4 *M.* & *S.* 414.

1820.

Saturday, February 5th.

The King *against* The Inhabitants of Great Clacton.

A child eight years old, born in *England*, but both whose parents were *Irish*, and without any settlement in *England*, and whose mother, after the death of her first husband, had married a settled inhabitant of the parish of *A.*, is removable, if chargeable, to the place of his birth, and is not within the 59 *G.* 3. *c.* 12. *s.* 33.

THE pauper, *John Welsh*, aged about eight years, was removed, by an order of two justices, from the parish of *St. Margaret*, in the borough of *Ipswich*, to the parish of *Great Clacton*, in the county of *Essex*. Upon appeal the sessions confirmed the said order, subject to the opinion of the Court of King's Bench upon the following case:

Walter Welsh, the pauper's late father, was born in *Ireland*, and was married in that county in 1807, to *A. Clately*, who was also born there. The pauper was born in 1810, in the parish of *Great Clacton*, and the father died in the parish of *St. Margaret* in 1817, without having gained any settlement in *England*. The mother subsequently married *H. Fayell*, a settled inhabitant of the parish of *St. Margaret*, where she resided, and the pauper had become chargeable. Before the last marriage she had acquired no settlement in *England*.

Cooper, in support of the order of sessions, was stopped by the Court.

Storks, contrà, contended that under 59 *G.* 3. *c.* 12. *s.* 33. the pauper ought to have been removed by a pass to *Ireland*.

But *The Court* held that the removal was properly made. Without determining what might have been the case

1820.

The KING *against* The Inhabitants of GREAT CLACTON.

case if the mother had been also removable at the time, it is clear here that she having acquired a settlement by marriage, the pauper's case is to be considered as if he had no parent alive. Then, if so, the clause in question only applies to persons who are themselves born in *Ireland*, which he was not. The order of sessions must, therefore, be confirmed.

Order confirmed.

The KING *against* The Inhabitants of CHELMSFORD.

Saturday, February 5th.

A parish apprentice and his master being both on the permanent staff of the local militia, in consequence of that circumstance resided together with his master, and continued to serve him in the parish of *B.* for forty days: it was held, that this residence was sufficient, and that he thereby acquired a settlement in *B*, notwithstanding they were both under the controul of their superior officers during the whole time.

TWO justices, by their order, removed *E. Spurgeon*, and *Ann*, his wife, and their two children, from *Braintree* to *Chelmsford*, both in the county of *Essex*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court, on the following case:

The pauper, on the 15th *December*, 1814, when he was fourteen years and six months old, was bound as a parish apprentice, by indenture, to *S. Spurgeon*, of the parish of *Halstead*, to learn the art of a cordwainer, and to serve him until the pauper should attain the age of twenty-one. The pauper served the first four years of his time in the parish of *Halstead*, when the master and the pauper went to and resided in the parish of *Chelmsford* and the pauper served his master there, under the indenture, for the period of nearly an year. In the year 1809, when about two years of the apprenticeship were unexpired, the master and apprentice having been appointed on the permanent staff of the fourth regiment of *Essex* local militia, of which the

1820.

The King *against* The Inhabitants of Chelmsford.

head quarters were at *Braintree*, went from *Chelmsford* to *Braintree* to reside there. The master had been appointed a serjeant; and the apprentice, a drummer, served the master, and inhabited forty days in the parish of *Braintree*. The pauper received his soldier's pay, whilst working for his master at *Braintree*, but not full wages; and the master refused to give up the indentures, till the expiration of the term expressed therein. The Court were of opinion, that the military duties, to which the apprentice was liable, on the permanent staff of the local militia, rendered him not sui juris, and prevented his gaining a settlement by the service and inhabitancy in the parish of *Braintree*.

Walford and *Brodrick*, in support of the order of sessions, contended, that no settlement could be gained by apprenticeship, unless the residence be referable to the apprenticeship. *Rex* v. *Barmby in the Marsh*. (*a*) In this case, the residence was because the pauper was serving in the local militia, and, during all the time, he could not be bound to obey the commands of his master, being bound to obey those of his commanding officer; he was, therefore, not sui juris. *Rex* v. *Beaulieu* (*b*), and all that is done by the local militia acts, which are the 48 *G.* 3. *c.* 111., and 49 *G.* 3. *c.* 40., is to make the apprenticeship continue, notwithstanding this service in the local militia; but it does not make such service a service under the apprenticeship.

Jessopp and *Cooke*, contrà, were stopped by the Court.

(*a*) 7 *East*, 381. (*b*) 3 *M.* & *S.* 229.

Abbott

1820.

The KING *against* The Inhabitants of CHELMSFORD.

ABBOTT C. J. In this case, I am of opinion, that the pauper gained a settlement by his residence in *Braintree*. It is not necessary for the Court to consider what would have been the effect, if the residence had been separate from that of his master, in consequence of his being in the local militia. Here he continued to reside in the same place with his master, and continued to serve him during the whole period. That is expressly stated as a fact by the sessions; and it is not impossible, that during a great part of the time, he might be actually serving his master. It is not necessary that the party should reside in a place, because he is an apprentice, so as to give him a settlement there; for *Rex* v. *Stratford on Avon* (*a*), is a distinct authority to the contrary. I am, therefore, of opinion, that the order of sessions ought to be quashed.

BAYLEY J. The best rule for us is to abide by the words of the statute 3 and 4 *W.* & *M. c.* 11. Those words are, that if any person shall be bound an apprentice, and inhabit in any town, such binding and inhabitation shall be adjudged a good settlement. Now here there was a valid binding, and the pauper resided in *Braintree* for forty days, where his master was at the time, and continued to do acts of service whilst he was so resident. His residence, therefore, was not wholly foreign to the purposes of the indenture, and was sufficient to confer a settlement.

HOLROYD J. I am of the same opinion. The pauper gained a settlement in *Braintree* by his resi-

(*a*) 11 *East*, 176.

dence

1820.

The King *against* The Inhabitants of Chelmsford.

dence there. I see nothing in the case to shew that his obligation to serve under the indenture was put an end to. It appears to me, that his service might lawfully continue; and, in point of fact, it did so continue during all the time. It is said, that the ground for his residence in *Braintree*, was, because he was a soldier; and so, in the case of *Rex* v. *Stratford on Avon*, the residence of the apprentice was in order that he might be cured of a sickness. Yet, inasmuch as it appeared there, that he continued to do acts of service for his master, notwithstanding his sickness, it was held, that the residence was sufficient to confer a settlement. That case seems to me to govern the present; and I am, therefore, of opinion, that the order of sessions ought to be quashed. (*a*)

Order of Sessions quashed.

(*a*) *Best* J. was absent in the Bail Court.

Saturday, February 5th.

The King *against* Richard Sheppard.

An order for stopping up an unnecessary highway, under 55 G. 3. c. 68. s. 2., must be made at a special sessions, and that fact must appear on the face of the order.

TWO justices of the peace for the West Riding of *Yorkshire* made the following order, dated 21st *September*, 1818. "We whose names are hereunto subscribed, being two of His Majesty's justices of the peace acting in and for the said riding, having, upon view, this day found that two certain public footways, leading &c. are unnecessary, do hereby order the same to be stopped up and discontinued from the public use." The sessions, on appeal, having confirmed the order, *Russell* in last *Trinity* term obtained a certiorari to remove both orders, for the purpose of quashing them, on the ground that the first order was insufficient, it not being there-

therein stated that it was made at a special sessions, and he cited *Rex* v. *The Justices of Worcestershire*. (a)

Littledale and *E. Alderson* shewed cause. It is not requisite that an order for stopping up an unnecessary highway should be made at a special sessions. This power was a new one given for the first time by 55 *G.* 3. *c.* 68. *s.* 2. And this is clear from the preamble, which recites, that it is expedient that His Majesty's justices of the peace should have power, under certain regulations, to stop up such highways. Then it is to be supposed, that all the regulations will be found in that act: the words are these: "And also when it shall appear, upon the view of any two or more of the said justices, that any public highway, &c. is unnecessary, it shall and may be lawful, by order of such justices, or any two of them, to stop up and sell such unnecessary highway, &c. by such ways and means, and subject to such exceptions and conditions as are mentioned in the 13 *G.* 3. *c.* 78." Now, here nothing is said of a special sessions. Where the legislature mean it to be done at a special sessions they have said so: for, in the case of a diversion of a highway, the words are, that it shall be lawful, "by order of such justices, at some special sessions," to do it. Here they have not only not mentioned it, but have added that it may be done by order of such justices, or any two of them, which could not be if the special sessions were composed of more than four; for in such a case it must be done by the majority present, and this distinguishes this case from *Rex* v. *The Justices of Worcestershire.* There the question arose on an order

(a) 2 *B.* & *A.* 228.

for

1820.

The King against Sheppard.

for diverting a way which, beyond all doubt, must be made at a special sessions, and the Court only decided, that in such a case, where the 55 *G.* 3. *c.* 68. gave no new power, but only regulated the exercise of that previouly given by 13 *G.* 3. *c.* 78., the special sessions must be convened in the particular mode pointed out by the 62d section of that act. Here it is a new power, and if, therefore, it is required to be exercised at a special sessions, it is not also requisite that it must be at a special sessions so convened. If not, then, inasmuch as every meeting of two justices, for a special purpose, is a special sessions, it is sufficiently apparent, on this order, that the act has been complied with. It may be contended, that the words "said justices" will incorporate the words "special sessions," but that is not so; for, by examining the 55 *G.* 3. *c.* 68., and the 13 *G.* 3. *c.* 78., together, it will clearly appear, that this expression, which is used throughout both acts, in every clause, merely means justices of the limits within which the particular highways happen to lie; nor will the words, by such ways and means, &c., do so, for these have only reference to the ways and means, exceptions, and conditions, of selling the highway, when stopped up, and have no reference to the stopping it up; and these will be found detailed, in the 17th section of the 13 *G.* 3. *c.* 78. Here the justices have followed, literally, the words of the act; and great inconvenience would follow, if, six months after a way has been stopped, after an appeal made, which has failed, after the land has been sold, and the money appropriated, a party, by certiorari, should be able to overturn all this, and that, more especially, in a case where, by the fourth section of the 55 *G.* 3. *c.* 68., it is declared,

that,

1820.

The King *against* Sheppard.

that, after the appeal shall have been determined, it shall be binding and conclusive on all persons whomsoever. If the 13 *G.* 3. *c.* 78. is to be incorporated with the 55 *G.* 3. *c.* 68., it should be so altogether, and then the certiorari is taken away. [*Abbott* C. J. There is no clause in the 55 *G.* 3. *c.* 68. which takes it away; and, unless that be so, it lies by the common law.]

Russell, contrà. No satisfactory reason can be given why an order for diverting an highway should be made at a special sessions, and an order for stopping up an unnecessary highway should not. Indeed, the latter case is a fortiori; for there the public are wholly deprived of their antecedent rights, and, in the other case, their rights are only abridged. So that both cases are, to say the least, within the same mischief; and it is, therefore, fair to infer, that the intent of the legislature was, to include them within the same salutary regulations. *Plowden*, 366., is an authority to shew, that this is the sound mode of construction of an act of parliament; and besides, there are the words "said justices," which refer to those next antecedent, viz. "said justices, at some special sessions." And if it be once established, that this order must be made at a special sessions, *Rex* v. *The Justices of Worcestershire* has decided, that the special sessions must be specially convened by notice to all the justices residing within the limits. The order, therefore, should have appeared, on the face of it, to have been made at a special sessions; and that not being so, it must be quashed for insufficiency.

Abbott C. J. I have already expressed my opinion, that, in this case, the certiorari is not taken away; and then

1820.

The KING against SHEPPARD.

then the only question remaining is, whether this order is, on the face of it, bad, it not being stated to have been made at a special sessions. I think that it is bad on that ground. It seems to me, that an order like this must, under the 55 *G.* 3. *c.* 68. *s.* 2., be made at a special sessions. It is admitted, that an order for diverting a road must be so made, and no reason can be assigned for such a provision in that case, which will not apply, with equal or greater force, to the present. I think there are words in this clause sufficient to shew this to be the intention of the legislature. After enacting, that the justices, at some special sessions, shall have power to divert highways, it proceeds to state, "And also, when it shall appear, upon the view of any two or more of the said justices, that a highway is unnecessary, it shall and may be lawful, by order of such justices, or any two of them, to stop it up." Now the words "said justices" may, as it seems to me, refer to the previous words, "such justices, at some special sessions:" if so, it will carry the plain intent of the legislature into effect, and avoid the incongruity which would otherwise arise. I am of opinion, therefore, that this order, and the order of sessions confirming it, must be quashed.

BAYLEY J. I am of the same opinion. It was determined, in *Rex* v. *The Justices of Worcestershire*, that, in order to constitute a special sessions properly, all the justices acting and residing within the limits must be convened; and this is a salutary regulation to prevent an improper exercise of such a power as the present. It seems to me that in the 55 *G.* 3. *c.* 68. *s.* 2. the words "special sessions" have been, by some accident, omit-

1820.

The King *against* Sheppard.

omitted. But I think we may take the words "said justices" as referring to the justices immediately antecedent, who are justices at some special sessions. This will supply the accidental omission, and carry into effect the intention of the legislature. This order is, therefore, bad.

Holroyd J. I have had great doubts in the course of this argument, whether it was necessary, under the particular words of this clause, that such an order as the present should be made at a special sessions. But, considering the words altogether, and the intent of the legislature, and the incongruity which would arise if we were to hold different regulations applicable to the present case, and the case where a highway is diverted, I am now satisfied that it is requisite that the order should be made at a special sessions. My doubt arose from not being clearly of opinion that the words "said justices" referred to the words "said justices at some special sessions," used in the previous part of the clause. However, considering that the general intention of the act was manifestly to give the the public the benefit of such a regulation, I think that in this case the order is bad.

Best J. The object of this act was plainly, as appears from the preamble, to protect the rights of public. It ought, therefore, to receive a liberal construction. The object was to give every possible degree of publicity to orders like the present; and we should entirely defeat this if we were to give the construction to it which is contended for by those who argue in support of this order. For it would follow, that, even after a special sessions, consisting of many magistrates, had

refused

1820.

The KING *against* SHEPPARD.

refused to make such an order, two justices might afterwards do so. That would be an absurd consequence, which the legislature never could have intended. The public inconvenience, which would arise from permitting such an order as this to be made not at a special sessions, seems to me to be greater than that arising in the case where a way is diverted. I think, therefore, that this order must be made at a special sessions. It is argued, that the legislature have not said so. But the words "said justices" seem to me to refer to the justices at some special sessions; and, even without these words, I should be of opinion that the words "special sessions" must, from the manifest intent of the legislature, over-ride the whole clause. I, therefore, fully concur in the opinion, that both these orders ought to be quashed.

Both orders quashed.

Saturday, February 5th.

HOBHOUSE'S Case.

The writ of habeas corpus at common law, although a writ of right, is not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit: Quære, whether under the stat. 31. *Car. 2. c. 2.*, which only applies to cases where the application is made to a Judge in vacation, the writ be grantable of course.

J. *EVANS* moved, on *Thursday, February 3.*, for a habeas corpus, to bring up the body of *John Cam Hobhouse*, Esquire, on an affidavit, that he was confined in *Newgate*, by a warrant from the Right Honourable *Charles Manners Sutton*, Speaker of the House of Commons, a copy whereof was annexed. Being desired to point out his objections to the warrant, he contended, that he was not bound to do so, because the writ of habeas corpus was grantable, in the first instance as of course; and the proper time for pointing out the defects of the warrant would be, upon the

return

1820.

HOBHOUSE'S Case.

return to the writ. And he cited *Rex* v. *Flower* (a), where Lord *Kenyon* said, that the Court were bound to grant the writ; and he also referred to stat. 31 *Car.* 2., *c.* 2. *s.* 10., where a judge in vacation is directed to do it, under a penalty of 500*l.*, upon refusal; which was a proof of the opinion of the legislature on the point. The Court, upon this, (absente *Bayley* J.) granted the writ; and, upon the return of it, the prisoner, in person, took several objections to the Speaker's warrant, which were over-ruled; and he was, accordingly, remanded. The prisoner having quitted the Court,

ABBOTT C. J. I wish to express my opinion as to the propriety of granting this writ of habeas corpus. It seems to me, that the Court are not bound, as of course, and without any cause shewn, to grant this writ in the first instance. It would be a very strange inconsistency in the law of *England*, if we were bound to do an act nugatory in itself, and that would be the case, if, upon a view of the copy of the warrant, a writ was, of course, to issue, the only effect of which would be, that, upon the return to it, the prisoner must be remanded. When this application was made, we were referred to a dictum of Lord *Kenyon*, in *Rex* v. *Flower*, and, in deference to that authority, we granted the writ. But I think, upon subsequent consideration, that we ought not to have granted it, inasmuch as it then appeared, that it could be of no use whatsoever to the prisoner. There is a very elaborate opinion, delivered by Lord C. J. *Wilmot*, in 1758, in the House of Lords, in answer to a question put by that House, whether, in

(a) 8 *T. R.* 324.

1820.

HOBHOUSE'S Case.

cases not within the 31 *Car.* 2. *c.* 2., writs of habeas corpus ad subjiciendum, by the law, as it then stood, ought to issue of course, or upon probable cause, verified by affidavit. (*a*) He there states it to be his opinion, that those writs ought not to issue of course; adding, that a writ which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course. And again, page 87., he says, "There is no such thing in the law as writs of grace and favour issuing from the Judges. They are all writs of right, but they are not all writs of course." And in page 88. "writs of habeas corpus upon imprisonment, for criminal matters, were never writs of course; they always issued upon a motion, grafted on a copy of the commitment; and cases may be put, in which they ought not to be granted." 1 *Lev.* 1. *Comberb.* 74. If malefactors under sentence of death, in all the gaols of the kingdom, could have these writs of course, the sentence of the law might be suspended, and, perhaps, totally eluded by them. The 31 *Car.* 2. *c.* 2. makes no alteration in the practice of the courts, in granting them: they are still moved for in term time, upon the same foundation as they were before; and when a single Judge, in vacation time, grants them under 31 *Car.* 2. *c.* 2., in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether treason or felony is specially expressed in the warrant of commitment; and there have been a great number of cases, where a doubt has arisen, on the frame and wording of the warrant; so that, even upon the act, the probable cause of bailing is really

(*a*) *Wilmot's Opinions and Judgments*, 81.

dis-

1820.

Hobhouse's Case.

disclosed to the Judge, unless the copy of the commitment is refused, and then the law will presume every thing against it; and in cases out of the act, which take in all kinds of confinement and restraint, not for criminal or supposed criminal matter, and to which this question relates, it has been the uniform uninterrupted practice, both of the Court of King's Bench and of the Judges of that court, that the foundation upon which the writ is prayed should be laid before the Court or Judge who awards it. I fully concur in this opinion, and, therefore, I desire, that our having granted this writ may not be considered as any authority to shew that this Court is bound to grant a writ of habeas corpus, as of course, and without any ground being stated for our interference.

Bayley J. concurred.

Holroyd J. The dictum of Lord *Kenyon*, in *Rex* v. *Flower*, was the reason of our granting the writ in the first instance, although it was contrary to the impression on my mind at the time. Even upon 31 *Car*. 2. I should think it very questionable, whether the writ was grantable of course; for that act directs a Judge to grant the writ in vacation, upon view of the copy of the warrant. Now for what purpose is he to view the warrant, unless he is to judge of the validity of the commitment? It is admitted, that he must judge of it afterwards, and must either discharge or remand the prisoner accordingly. Then why should he not do so at first? This, however, is not an application within that act, being for a habeas corpus at common law; and in that case it is laid down by Lord C. J. *Wilmot*, that the party applying for the writ must lay a reasonable

1820.

HOBHOUSE'S Case.

ground before the Court, in order to induce them to grant the writ.

BEST J. When this writ was moved for, we were pressed with the opinion of Lord *Kenyon*, in *Rex* v. *Flower*, which seemed to support the claim then insisted upon. The Court did not then think that that opinion was well founded. But, as it was a matter of great importance to the liberty of the subject, we thought it proper that the matter should be well considered. I am now convinced, that when we see that the party, when brought before us, must be remanded, we are not bound to grant the writ. It would be manifestly absurd to bring a person from *Cornwall* or *Northumberland*, when the Court knew, at the time when the writ was moved for, that the prisoner, when brought before them, must be remanded. The Court, in *Rex* v. *Schiever* (*a*), refused the writ, when it appeared that the person applying was a prisoner of war; and the same thing was done by the Court of Common Pleas, in the *Spanish* sailor's case. (*b*) If the Court could not examine into the legality of the custody, until the prisoner was brought before them, they ought to have granted the writs in both those cases; but they said, as the prisoners must be remanded when brought before them, they would refuse the writ. The cases in which prisoners have a right to the writ are where they are detained in prison, when they are entitled to be admitted to bail. This right is secured to such prisoners by the 31 *Car*. 2. *c*. 2. Before the passing of that statute, prisoners committed for bailable offences were some-

(*a*) 2 *Burr*. 765. (*b*) 2 *Black. Rep*. 1324

times

1820.

HOBHOUSE'S Case.

times kept for a long time in prison, without being brought to trial. To prevent this grievous oppression, the habeas corpus act directs, that if any person be committed, or detained for any crime, unless for treason or felony, other than persons convict, or in execution by legal process, he may apply to the Lord Chancellor, or a Judge in vacation, and the person so applied to is to cause such prisoner to be brought before him, and to discharge him from imprisonment, upon his recognizance to appear in the court where his offence is cognizable. In cases which come under this statute, a single Judge may, perhaps, be obliged to grant the writ as of course, but in no other; and the provisions of this law do not apply to writs grantable by the Court in term time. I, therefore, fully concur in the opinions already pronounced on this subject.

The prisoner was remanded.

JOHN COOPER *against* JONES, Gent.

Tuesday, February 8th.

A testator having three sons, devised as follows: I leave the *Withy Stakes* farm, with the appurtenants, to my two youngest sons, *John* and *George*, equally between them, share and share alike; and I entail the said farm on the male heirs of *John* and *George*, being born in wedlock. There being no devise over, it was held, that cross-remainders could not be raised by implication, and that on the death of *George* without issue, his moiety went to the heir at law.

TROVER for title-deeds of a farm, called the *Withy Stakes* farm, detained by defendant on the behalf of *James Cooper* the younger, under the following circumstances: *James Cooper* the elder having three sons, *James*, *John*, and *George*, made his will, dated *October* 30th, 1798, and devised as follows; first, I leave the *Withy Stakes* farm, with all appurtenants thereto be-

 long-

1820.

Cooper against Jones.

longing, to my two sons, *John Cooper* and *George Cooper*, equally between them, share and share alike, and all my household goods, and my whole stock of cattle, and husbandry ware of all kinds whatsoever, with all my bonds, bills, and book-debts, and cash, and personal property, paying all my debts, funeral expences, and legacies hereinafter named; and I entail the *Withy Stakes* farm on the male heirs of *John Cooper* and *George Cooper*, being born in wedlock. The testator afterwards departed this life, without altering or revoking his said will, leaving the plaintiff and *George Cooper*, and *James Cooper* his eldest son and heir at law, him surviving. The will was duly proved in the consistory court of *Litchfield*. On the 30th day of *October*, 1810, *George Cooper*, one of the devisees in the said will of the *Withy Stakes* farm, having survived the testator, afterwards died intestate and without issue. In consequence of this the plaintiff claimed to be entitled to the entirety of the *Withy Stakes* farm under the will; and *James Cooper* claimed one moiety of it as heir at law both of the testator and of *George Cooper*.

Abraham, for the plaintiff. No case can be cited where any Court have decided that for want of a devise over cross-remainders cannot be implied. The rule seems to be, that, whenever the Court can collect the intention of the testator to be that no part of the estate should go to the heir at law till the happening of a particular event, they will imply cross-remainders in the mean time. In *Davenport* v. *Oldis* (*a*), Lord *Hard-*

(*a*) 1 *Atk.* 579.

wicke

1820.

COOPER *against* JONES.

wicke decided against the cross-remainders on the ground of the words "several and respective," which were there introduced; and *Comber* v. *Hill* (*a*), and *Williams* v. *Brown* (*b*), proceed also on the word "respective:" but those cases do not seem to have been adopted as sound decisions; for in *Wright* v. *Holford* (*c*), *Watson* v. *Foxon* (*d*), and *Doe* v. *Webb* (*e*), a different rule prevailed; and in the two last cases the Court diregarded the word respective as being immaterial. And in *Stephens* v. *Green* (*f*), the Lord Chancellor acceded to the same opinion. It is true that in all these cases there was a limitation over; but that was not the only circumstance relied on by the Court; for in *Phipard* v. *Mansfield* (*g*), *Willes* J. relies on the circumstance of the will containing the words heirs of their bodies, as well as the limitation over. Besides, this is a devise to two only; and in that case the law makes a presumption in favour of cross-remainders, which, as has been justly observed, is almost always consistent with the testator's intention, *Pery* v. *White*. (*h*) Here the testator leaves a farm to his two youngest sons, equally between them, and then adds, after some intermediate devises, "And I entail the *Withy Stakes* farm on the male heirs of *John* and *George Cooper*, born in wedlock." It was, therefore, his intention that so long as any of their male descendants survived, that the farm should belong to them. And, in order to carry this into effect, cross-remainders must be implied in the present case.

(*a*) *Str.* 969.
(*b*) *Str.* 996.
(*c*) *Cowp.* 31.
(*d*) 2 *East*, 36.
(*e*) 1 *Taunt.* 234.
(*f*) 11 *Ves.* 78.
(*g*) *Cowp.* 798.
(*h*) *Cowp.* 777.

 W. D. Evans,

1820.

Cooper *against* Jones.

W. D. Evans, contrà, was stopped by the Court.

Abbott C. J. It is admitted that no case can be cited in which the Court have defeated the claim of the heir at law, unless there are words in the will by which the testator has clearly indicated his intention that the heir at law should take nothing until the happening of some particular event. Now, no such words can be pointed out in the present case. The words are, "I leave the *Withy Stakes* farm, &c. to my two sons *John* and *George*, equally between them, share and share alike." And he afterwards adds, "And I entail the *Withy Stakes* farm on the male heirs of *John* and *George*, being born in wedlock." Now, these latter words only enlarge the previous estate for life into an estate tail; but they leave the question untouched as to the tenancy in common. I think, therefore, that *John* and *George* were tenants in common of the *Withy Stakes* farm, and that we cannot raise cross-remainders between them by implication. The consequence of this is, that on the death of *George* without issue his share went over to *James*, the eldest son, as heir at law. The defendant, therefore, is entitled to our judgment.

Bayley J. The usual ground on which the courts of justice have relied for raising cross-remainders by implication is the language used in the limitation over. If, from that language, it appears to have been the intention of the testator that the whole estate should go over to the heir at law together, and that no part of it should descend to him till the happening of a particular event, the Court have said that cross-remainders ought to be implied. In the case of *Phipard* v. *Mansfield* no such words

1820.

COOPER *against* JONES.

words could be found, and the Court held that cross-remainders could not there be raised by implication. This case is stronger than that; for here there is no ulterior limitation at all. And it seems to me that in case we were to decide for the plaintiff now, it would next be contended, that if there was a devise to two persons of an entire estate in tail, as tenants in common, cross-remainders ought to be implied between them. The words, "I entail," &c. are here not words of purchase, but of limitation. I am, therefore, of opinion, that the heir at law, upon the event which has happened, became entitled to the moiety of the *Withy Stakes* farm, and that the plaintiff must be nonsuited.

HOLROYD J. I am of the same opinion. There must be some circumstance manifesting the testator's intention to be so, in order to induce the Court to raise cross-remainders by implication, even as between two persons. Here there is nothing from which such an intention can be ascertained; and that being so, the rule of law, that cross-remainders are not to be implied, must prevail. Here, the only effect of the subsequent words in the devise was to enlarge the estates for life into estates tail. But the devisees still remained tenants in common of the *Withy Stakes* farm.

BEST J. There is nothing in this case from which we can raise cross-remainders by implication. All that the Courts have said is, that they will favour cross-remainders between two. But from that circumstance alone they have never said that they would raise them. In all the cases it is the language of the devise over on which

1820.

COOPER *against* JONES.

which the Courts have relied. Here there is no such devise in the will. I think, therefore, that the defendant is entitled to our judgment.

Judgment of nonsuit.

Tuesday, February 8th.

Cox *against* Earle.

In an action upon a bill of exchange with several indorsements, by a plaintiff who had paid the bill under protest for the honour of one of the indorsers, it was held sufficient, even upon special demurrer, to state that he had paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last indorsee.

DECLARATION upon a bill of exchange, bearing date 21st *July*, 1819, drawn upon the defendants, payable in *London*, three months after date, to the order of *D. Lightfit* and Co. for 250*l.* sterling, accepted by defendants, and indorsed by *Lightfit* and Co. to *Merchant*, and by *Merchant* to *Bauer*, with several intermediate indorsements; the last indorsee being Sir *Richard Car Glyn* and Co. The presentment of the bill for payment was then stated, and that *Glyn* and Co. caused it to be protested for non-payment; and that the plaintiffs, according to the usage and custom of merchants, appeared before the notary public by whom the bill had been protested, and declared they would pay the same under protest, for honour of the second indorser; and that they, thereupon, according to the usage and custom of merchants, paid the bill, under protest. To this declaration there was a special demurrer, and the cause assigned was, that it did not appear to whom the plaintiffs paid the bill, under protest, or that it was paid to the holder; or that the plaintiffs became the legal holders thereof, by virtue of such payments, or otherwise; and now the case was argued by

Parke,

1820.

Cox
against
EARLY.

Parke, in support of the demurrer. It does not appear that the plaintiffs paid the bill to any person who had a legal title to it. The custom of merchants is stated, in the case of *Lewin* v. *Brunetti* (*a*), to be, that the person who, for the honour of the indorser, pays the last indorsee the amount of the bill, may maintain an action upon it: but this declaration does not shew, that the party to whom the payment was made was the indorsee, or had any title to the bill. In the above cited case, this objection was taken upon error; and the Court there held, after several arguments, (*Pollexfen* C. J. hæsitante,) that it was well enough after verdict, for it was then to be presumed, that there was sufficient proof, at the trial, that it was duly paid, viz. to the last indorsee. It appears, therefore, to have been the opinion of the Court, that the objection was good, upon special demurrer; and that case is an authority in in point. A person paying, for the honour of a party, to a bill, stands in the situation of an indorsee; but, by analogy to a declaration by an indorsee, all the steps by which his title is made out should be stated in the declaration; and if there be any defect pointed out, on demurrer, the declaration is bad. Here the objection is, that the title of the plaintiff is not properly made out, as it is not stated that he paid it to the indorsee.

Per Curiam. Payment to a wrong person is no payment. If an issue were taken on the fact of payment, the affirmative could not be supported, unless it were shewn, that the payment was made to the right

(*a*) *Lut.* 899.

per-

1820.

Cox *against* Earle.

person. In this case, it is expressly averred, that the payment was made according to the custom of merchants. There was no such averment in *Lewin* v. *Brunetti*, and that is a material distinction between the two cases.

Judgment for the Plaintiff.

R. V. Richards, contrà, was to have argued in support of the declaration.

The King *against* Borron, Esq.

Where a criminal information is applied for against a magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive, (amongst which fear and favour are generally included,) or from mistake or error only. In the latter case, the Court will not grant the rule. Secondly, in the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case.

Denman, in last *Michaelmas* term, obtained a rule nisi, for a criminal information against the defendant, a magistrate for the county of *Lancaster*. On the last day of that term, *J. Williams* shewed cause against the rule, and *Denman*, *Chitty*, and *Hill* were heard in support of it. The circumstances of the case were so fully stated by the Lord Chief Justice, in pronouncing the judgment of the Court, in the course of this term, that it has been thought proper to omit them here.

Cur. adv. vult.

Abbott C. J. In the course of the last term, a rule was granted, on the application of Mr. *Charles Pearson*, an attorney of the city of *London*, calling upon *John Arthur Borron*, esquire, one of his majesty's justices of the peace of the county of *Lancaster*, to shew cause

why

1820.

The KING *against* BORRON.

why a criminal information should not be exhibited against him, for refusing to take the examination of two persons, of the names of *Thomas Richardson* and *Robert Rimmer*, on a charge against a third person, of having feloniously cut and wounded the said *Thomas Richardson*, on the 16th of *August* last, at *Manchester*. Mr. *Borron* is a justice, acting for the *Warrington* division, and not for the division of *Manchester*, wherein the offence was alleged to have been committed. Cause was shewn against the rule, on the last day of the term; and it appearing, upon the arguments of counsel, that an important question was supposed to be raised, regarding the execution of the office of a justice of the peace on the one hand, and the right of the subject to enquiry and investigation on the other, we thought it expedient to peruse the affidavits attentively, before we pronounced our rule in the case, which could not, without great inconvenience, be done on the last day of the term. We have, accordingly, perused the affidavits attentively, during the late vacation; and, upon such perusal, it appears to us, that the application for a criminal information is not sustained. The application is made against a gentleman, who is one of that class of persons to whom this country is under as great obligations as this or any other nation is, or ever was, to any members of its community; — I speak of the gentlemen residing in the different parts of *England*, who act in the execution of his majesty's commission of the peace, and who gratuitously devote a great portion of their time, and bestow much valuable, but often thankless labour, in the administration of many branches of the law; and, among others, in most of the early, and in many of the mature stages of our criminal jurisprudence.

1820.

The King *against* Borron.

dence. In this most valuable class, many persons are found who possess a sound knowledge of the law, united with the most useful and extensive practical information. They are called upon, in many cases of a difficult, and in many of a delicate kind, and are, in general, addressed by those who apply to them with the respect that is due to their station and character. The present case affords an unusual, if not a solitary instance, of address, in the language of demand and menace. They are, indeed, like every other subject of this kingdom, answerable to the law for the faithful and upright discharge of their trust and duties. But, whenever they have been challenged upon this head, either by way of indictment, or application to this Court for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment. To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom. Upon these principles, the present application to this Court is to be decided by us. But even if it were to be decided upon a more strict and rigid rule, we should not be able to find any error or mistake in the conduct of Mr. *Borron*, except, perhaps, that of having shewn too much attention to an application made to him in a most improper and unbe-

1820.

The KING *against* BORRON.

unbecoming menner. Mr. *Charles Pearson*, of *London*, the person now applying to this Court, informs us, by his affidavit, that he was retained, on the 23d of *October* last, by *Thomas Richardson*, of *Manchester*, to bring before the proper tribunal a charge which he had to prefer against an individual, whose surname is mentioned, for having feloniously, &c. cut and wounded the said *Thomas Richardson*, on the 16th of *August*, at *Manchester*. He then proceeds to mention the facts of the case, as communicated to him by *Thomas Richardson*, all the material parts whereof are also mentioned in the affidavit of *Thomas Richardson*, and such of them as are said to have been witnessed by *Robert Rimmer* are mentioned in his affidavit also. Affidavits, to be sworn by these two persons, were prepared by *Pearson*, after his return to *London*, and sent down by him to *Manchester*; and their affidavits, now before the Court, appear to contain many expressions not likely to be used by persons of their situation in life. These affidavits present two facts very important to the present enquiry: first, that the name of the person, by whom the supposed felony was committed, was unknown to *Richardson* and *Rimmer* at the time, and not discovered until after the assizes, which had intervened between the subject of complaint and the application to Mr. *Borron*; secondly, that the attack upon *Richardson* was made wantonly and wilfully, after the meeting at *Manchester* had been dispersed, by the authority of the justices acting in that district, when *Richardson* was going from the place of meeting peaceably, and alone; at a time, therefore, and under circumstances, in which those who had ordered the dispersion of the meeting, whether such order had been

pro-

1820.

The King *against* Borron.

properly or improperly given, could not be responsible for the act of the supposed offender. *Pearson* further states a measure adopted by himself, for the purpose of satisfying himself that *Richardson* had not mistaken the person accused, in which he appears to have conducted himself with becoming caution. The first of these facts, namely, the discovery of the name of the offender, after the assizes, does not appear to have been communicated to Mr. *Borron*. According to the representation made to him, the supposed offender was living at *Manchester*, not having fled, nor being likely or expected to fly from the calls of justice. The latter of these facts, namely, the time and circumstances of the alleged offence, were, at the first interview, mentioned to Mr. *Borron*, but his attention was not then, or afterwards, called to them as it ought to have been, in order to remove the ground of his disinclination to interfere, which was manifested at the first meeting. On the contrary, Mr. *Borron* was informed, as the reason for applying to him to exercise his authority on a matter arising in a part of the country in which he did not reside, and for which he had never acted, that the justices acting for the *Manchester* division had refused to enquire into some similar charges against the yeomanry, alleging that they might be, in some sense, considered as connected with the proceedings of that day, and as such, so implicated, as to render it improper for them to take cognisance of the charges. And it is obvious to us, and was apparent at the time, that Mr. *Borron's* reluctance to act on the occasion was grounded on the consideration, that his brother justices were in some way connected with the subject of complaint. It was the duty of an attorney to have pointed out the distinction. For such

1820.

The KING *against* BORRON.

such purposes, and perhaps for such alone, can the presence of an attorney be useful on such an occasion. It appears, further, by the affidavits on each side, that Mr. *Borron* desired a day to consider of the matter, and, before his final refusal, consulted another justice of the county, who agreed in opinion with him, as to the conduct proper for him to adopt; and the fact of such consultation, at least, if not the opinion of the other justice, was made known to *Pearson*. The reason of Mr. *Borron*'s refusal to act, as furnished to the Court by the affidavit of *Pearson*, was, that he declined any official interference with regard to individuals who could with difficulty be separated from the magistrates of *Manchester* on legal grounds. From Mr. *Borron*'s affidavit, also, it appears, that this was the reason assigned by him, though much more at large; more, indeed, than was necessary. By Mr. *Borron*'s affidavit, it also appears to the Court, *for the first time*, that he accompanied his then refusal with expressions to the following effect: "I by no means, however, wish it to be understood, that I shrink from any responsibility on this occasion, from personal inconvenience or trouble; and that if I am directed by the Court of King's Bench, to which you intimate your intention to apply, I shall, fearlessly, and without regard to any party, proceed to investigate the charges submitted to me; charges, which not being now entertained, cannot be attended with any further consequences, than the not securing the persons of the individuals charged, during the interval to the next assizes, when bills of indictment may be preferred, which my refusal does not prejudice; a circumstance which, considering the lapse of time that has intervened, from the day the cause of complaint

1820

The King against Borron.

arose, without the party's absconding, gives rise to little apprehension of such an event taking place." Now, if this offer to investigate the charges, in case this Court should direct Mr. *Borron* to do so, had been communicated to us by the affidavit of *Pearson*, most undoubtedly, we would not have granted a rule for a criminal information. The suppression of the offer necessarily leads us to discharge the rule with costs, according to the usual practice in cases of this kind, and induces a strong suspicion, that the application was made for a very different purpose from that of having the matter of *Richardson*'s complaint investigated by a justice of the county; for Mr. *Borron*'s refusal was made on the 26th of *October*, and a mandamus might have been moved for on the sixth or seventh of the following month; and it is not surmised, that the person accused had absconded, or that an ultimate failure of justice is likely to occur. There are, however, some other circumstances in this case, which the Court cannot leave unnoticed. The whole conduct of *Pearson* towards Mr. *Borron*, as detailed by *Pearson* himself, was highly indecorous. An attorney applying to a justice of the peace, to act in a matter arising out of his district, addresses him, throughout, in a tone of demand, he tells him the nature of the complaint, informs him that persons to prove it are in attendance, requires him to take their examination, and adds, "and I shall then take leave to comment upon the evidence, in order to apply the facts to the law of the case, and to obtain from you a warrant for the apprehension of the accused." Now this comment upon the evidence, is a thing which an attorney had no *right* to make. An attorney has no right even to be present at such

1820.

The King *against* Borron.

such an enquiry. The presence of an attorney, on such occasions, is often permitted, as a matter of courtesy; his assistance is sometimes desired, and if his advice and opinion are asked, it is proper for him to give them; but he is not to take leave, uninvited, to obtrude his commentaries upon the case. Much less can it be endured, that he should say, on an occasion like the present, even in a respectful manner, "I make this application to you, as a ministerial officer; and, if you refuse to hear the evidence, I shall consider your refusal as a neglect of your magisterial duty, and shall apply to the Court of King's Bench, by information or otherwise, for redress." This was not an occasion on which a justice of the peace was to act as a ministerial officer; on the contrary, he was to exercise a judicial discretion on a subject important in itself, and rendered peculiarly delicate, by the situation in which he stood. Whatever respect there might be in the manner of the address, its language was unfit and unbecoming. Yet was language of the same threatening import addressed, the next day, in a prepared written notice. The paper delivered to Mr. *Borron*, when he returned, after consulting Mr. *Lyon*, and before he had expressed his decision, concludes in these words; "and I do hereby give you notice, that if you refuse or neglect to hear such evidence, and to take such examination, I shall apply to the Court of King's Bench, on the first day of next *Michaelmas* term, for a criminal information against you, the said *John Arthur Borron*, for having for fear or favour, refused to hear and examine witnesses touching and concerning a felony committed within the said county of *Lancaster*, of which you are one of the justices, as aforesaid." Little of that high

1820.

The King *against* Borron.

minded and honourable sentiment, which usually influences the gentlemen who act in the commission of the peace, could be expected from one who should yield to such a threat. And we should be wanting in the discharge of our duty, if we forbore to express our disapprobation of such language. It is necessary only to add, further, that as the application to this Court, appears to be the act of Mr. *Charles Pearson*, the costs of the rule must be paid by him.

Rule discharged, with costs.

Wednesday, February 9th.

Arnitt *against* Garnett.

Under the stat. of the 8 *Anne*, c. 14. the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the Court, upon motion, ordered the same to be paid to the landlord, even where the notice was given after the removal of the goods from the premises.

A RULE nisi had been obtained by *Tindal* calling upon the sheriff of the county palatine of *Lancaster*, to shew cause, why he should not pay over to *William Gregson* all money received by him for the proceeds of a sale of certain goods of the defendant, seized under a writ of execution at the suit of the plaintiff on the premises of *Gregson*, occupied by the defendant. It appeared, upon the affidavit, that the sheriff had seized the goods of the defendant in execution, and had actually removed them to an auctioneer's for sale before nine o'clock in the morning; at that hour he received notice from the landlord, who then first heard of the execution, to retain for the amount of his rent. After this notice, the sheriff sold the goods in execution and refused to pay over the amount of a year's rent to the landlord.

Parke now shewed cause. The goods had been removed from the premises before any notice was given, and

1820.

ARNITT *against* GARNETT.

and the sheriff was, therefore, afterwards justified in selling them without paying the year's rent to the landlord. The latter cannot distrain the goods which are taken in execution, and the object of the 8 *Anne*, c. 14. was only to remedy this, and to give to the landlord a specific lien on the goods to the extent of one year's rent. The notice comes in lieu of a distress; and as the latter would be too late when the goods are removed, so the notice ought, in like manner, to be given whilst they are on the premises, *Henchett* v. *Kimpson*. (a) All the authorities shew that the sheriff is not bound to retain, unless he has notice from the landlord before the goods are removed, *Waring* v. *Dewberry* (b), *Palgrave* v. *Windham* (c) and *Smith* v. *Russell*. (d) At any rate the Court will not decide such a point on motion, but leave the landlord to his remedy by action, where it might be more solemnly considered; and the more so, as it appears on some of the affidavits, that there were sufficient goods left for the landlord to distrain upon: and non constat that in an action he would obtain the full amount of the year's rent, as he might have distrained on the residue.

ABBOTT C. J. Unless we were to repeal this act of parliament we must make this rule absolute. The statute says in express terms, that no goods shall be taken by virtue of any execution unless the party at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord a year's rent. It is true that the sheriff does not become a wrong-doer

(a) 2 *Wils*. 140. (b) 1 *Str*. 97.
(c) 1 *Str*. 212. (d) 3 *Taunt*. 400.

by

1820.

Arnitt *against* Garnett.

by the act of removing the goods, until he has notice of the landlord's claim, and perhaps a notice may be necessary to support an action against him as a wrong-doer. That, however, is no reason why the landlord should not have his rent. Here the sheriff had notice of the landlord's claim, while the goods were unsold, and he had the means of payment in his hands. We are bound, I think, to hold him responsible to the landlord for the year's rent. If we were not so to hold, the consequence would be, that all the goods might be swept away, before the landlord could know of the execution, and he would lose his rent.

Bayley J. This is a very plain case. The statute says, that the goods are not to be taken unless the plaintiff shall, before removal, pay the year's rent. The effect of the argument in this case would be, that the sheriff might remove instanter, and that by so doing the landlord might be deprived of his rent; that would operate as a repeal of the statute.

Holroyd J. The landlord is clearly entitled to his rent, unless he has waved his right. The statute expressly says, that the goods are not to be removed unless the plaintiff pay the rent. It is true, that no action would lie against the sheriff for any act done by him, before he had notice of the landlord's claim; because, until such notice the sheriff could not be a wrong-doer, but as long as the money remained in the hands of the sheriff, the landlord's right was not gone, and notice having been given before the money was paid over to the plaintiff, I think the sheriff is responsible.

Best J. concurred.

Rule absolute.

1820.

TAYLOR *against* NICHOLLS.

Wednesday, February 9th.

To trespass quare clausum fregit, defendant pleaded not guilty, and a justification of a right of way; plaintiff, in replication, admitted the right of way, and new assigned extra viam. The plaintiff having obtained a verdict on the new assignment, with 1s. damages, was held entitled to full costs.

TRESPASS, quare clausum fregit. Plea, first, not guilty, upon which a verdict was found for the plaintiff; secondly, a justification of a public right of way generally (not setting out the way by meets and bounds) over the locus in quo. Replication, admitting the right of way, and new assigning extra viam. Issue on the new assignment. Verdict for the plaintiff on the new assignment, with 1*s.* damages. The Master taxed the plaintiff his full costs. A rule having been obtained, calling on the plaintiff to shew cause why the Master should not review his taxation.

Gurney and *Chitty* shewed cause, and relied upon *Asser* v. *Finch* (*a*) and *Martin* v. *Vallance* (*b*), as authorities expressly in point.

Marryat, *Walford*, and *Broderick*, contra. The new assignment is in the nature of a new declaration. The plaintiff would not be entitled to more costs than damages, unless the Judge certified, or it appeared upon the pleadings, that the title to the freehold came in question. The right claimed is of a public way, and the way is admitted upon the record; and the only question upon the pleadings was, whether the defendant deviated from the way, and that does not involve any question as to the freehold. [*Bayley* J. It involves

(*a*) 2 *Lev.* 234. (*b*) 1 *East*, 350.

1820.

Taylor against Nicholls.

the question, whether the plaintiff has a freehold subject to an incumbrance.] In *Gregory* v. *Ormerod* (a), the authority of *Asser* v. *Finch* and *Martin* v. *Vallance* were doubted.

Abbott J. I am of opinion that the plaintiff is entitled to his full costs. If we were to hold otherwise we should act contrary to all the authorities upon the subject. The case of *Asser* v. *Finch* (b) was decided soon after the passing of the statute 22 & 23 *Car*. 2. *c*. 9., and the rule there laid down has been acted upon in many subsequent cases. In *Martin* v. *Vallance* this Court considered that the practice had been so long settled, that it was then too late to question the propriety of it. And I think we are equally precluded from entertaining the question at the present time. This rule must, therefore, be discharged with costs.

Rule discharged with costs.

(a) 4 *Taunt*. 98. (b) 2 *Lev*. 251.

Saturday, February 12th.

The King *against* Henry Hunt and Others.

The Court will permit a suggestion to be entered on the record, for the purpose of carrying the trial of a misdemeanour into an adjoining county, where there appears a reasonable ground on the affidavits for believing that a fair and impartial trial cannot be had in the county where the venue is laid; and the suggestion need not state the facts from whence such inference is to be drawn.

THE defendant, *Hunt*, a few days before the end of term, had obtained a rule nisi for a certiorari to remove the indictment found against himself and others at the last *Lancaster* assizes, for a conspiracy, in order that a suggestion might be entered on the record for

the

the purpose of carrying the trial into such other county as the Court should direct. The affidavits, which were several, stated, that the indictment arose out of a supposed conspiracy, connected with the proceeding of a numerous meeting, held at *Manchester* on the 16th of *August* last, 1819, and that that meeting had been dispersed by an attack of the military, directed by a body of the *Lancashire* magistrates; that among the military who attacked them were the *Manchester* and *Salford*, and *Cheshire* yeomanry, the privates of whom consisted chiefly, and the officers entirely, of opulent manufacturers, and landed proprietors, in *Lancashire* and *Cheshire*, and that a very great and general prejudice existed throughout the county of *Lancaster*, and amongst the persons who were likely to serve upon juries, as to the nature and object of the meeting in question, and as to the share which the defendants had taken in it; and, therefore, that they could not have a fair and impartial trial in the county of *Lancaster*. At the time of obtaining the rule, it did not appear, upon affidavit, that the other defendants (who were not present) had assented to the application. But, on this day, when cause was shewn, that defect was supplied by a messenger having been sent down and having returned from *Manchester*, where they resided, with their consent in writing.

The *Attorney-General* and *Solicitor-General* shewed cause. They produced the freeholders' book for the county of *Lancaster*, verified by affidavit, which appeared to contain the names of about 8700 freeholders. And they referred to the case of *Rex* v. *Harris* (*a*), in

(*a*) 3 *Burr.* 1330.

which

1820.

The KING against HUNT.

which the Court refused an application to change the place of trial, upon the ground that the affidavits only in that case stated the apprehension and belief of the applicant. It there appeared that there was a list of 600 persons qualified to serve on the jury, and the Court there said, that as there was no fact suggested to warrant the conclusion, that there could not be a fair and impartial trial, the rule must be discharged. In *Rex* v. *Waddington*, distinct facts were suggested as the ground for the application.

The defendant, *Hunt*, in person, contended, that in this case sufficient ground for the application did appear. Upon the affidavits it is sworn, that the *Manchester* and *Salford* yeomanry, as well as the *Lancashire* magistrates, are directly interested in the question; and yet it is clear, that if they, or any of their relations or friends, were returned on the jury pannel, it would be no cause of challenge. And he referred to the language used by Lord *Kenyon* in *Rex* v. *Waddington*. (a)

The Court delivered their opinions seriatim; and, after observing that it was of the highest importance that the administration of justice should not only be pure, but above all suspicion, they said that, as upon the affidavits it did appear that if the trial took place in the county of *Lancaster*, it might possibly happen, that persons might be summoned on the jury whose opinions might be tainted with very strong prejudice, but whom it would, nevertheless, not be competent for the defendant to challenge, they thought that the applica-

(a) He read this case from a pamphlet.

tion

1820.

The KING *against* HUNT.

tion should, upon certain terms, be granted; adding, that those terms became necessary only in consequence of the gross neglect on the part of the defendants, in having suffered nearly two terms to elapse before they applied to the Court. They then pronounced the following rule: "It is ordered, That a writ of certiorari shall issue direct to the justices of oyer and terminer in and for the county of *Lancaster*, to return into this court an indictment found before them against the said *H. H.* and others, for certain misdemeanors, and that unless the said defendants shall, within ten days now next following, procure the said indictment, and also the recognisance conditioned to appear and plead in this court thereto immediately, and to appear personally at the trial of the said indictment, and acknowledged by such of the defendants as are now under recognizance, in such sums as are mentioned in their present recognisances, and by the same or other good and sufficient bail, to be returned into this court; and, also, within such ten days, cause appearances and pleas for all the defendants to be entered in this court, with the proper suggestion of carrying the trial into the county of *York*, a writ of procedendo shall issue to carry back the said indictment: and it is further ordered, that service of any rule noticed or other matter upon Mr. *Charles Pearson*, shall be deemed good service on all the defendants, and that they shall all concur in reducing the special jury, the prosecutor being at liberty to carry down the record for trial, and defendants consenting to take short notice of trial, and that if there be any delay on the part of any of the defendants, so as to prevent a trial at the next *York* assises, a writ of procedendo shall issue."

In

1820.

The King *against* Hunt.

In the course of the argument a doubt was suggested by *Bayley* J., whether, unless some distinct fact were stated in the suggestion, it would not be a mis-trial; whereupon the record in *Rex* v. *Waddington* was sent for into court, and it was found that no such distinct fact appeared in the suggestion in that case. The form of such a suggestion is as follows:

Rex v. *H. H. and others.* } And thereupon the said *Henry Hunt*, &c. say, that a fair and impartial trial of the issue above joined cannot be had by a jury of the county of *Lancaster*, and that it is convenient that the trial of the said issue should be by a jury of the county of *York*, which is a county next adjoining. Which allegation of the said *H. H.*, &c. the said coroner and attorney of our said lord the king, who, for our said lord the king, in this behalf prosecuteth, doth not deny, but doth admit the same to be true. Therefore let a jury, &c.

Dyster *against* Battye and Another.

To a declaration in an action on the case founded in tort, a plea of not guilty of the [illegible] in de[illegible]tion within [illegible]ars, is bad up[illegible]n special de[illegible]urrer.

THE declaration stated, that before the committing of the grievances by the defendants therein after mentioned, the defendants, as brokers or factors, had in their custody and possession certain goods and merchandizes, to wit, 3000 hides, belonging to persons trading under the firm of *Graham*, *Rigg*, and Co., and that defendants had requested the plaintiff to accept and pay two several bills of exchange, amounting together to 2500*l.*, drawn by the defendants upon him, and to sell the hides and ap-

ply

1820.

DYSTER *against* BATTYE.

ply the proceeds towards the repayment of the amount of the bills. It then stated, that the defendants, intending to deceive the plaintiff, and to induce him to accept and pay the said bills, wrongfully, fraudulently, and deceitfully represented to the plaintiff, that the hides were the proper goods and merchandizes of them, the defendants, and that they delivered and deposited the same with the plaintiff for the purpose of the same being sold and the proceeds thereof applied as aforesaid, whereas, in truth, they were not, and the defendants well knew them not to be the proper goods and merchandizes of them, the defendants; but that the same were in their custody as brokers or factors only. It then averred, that the plaintiff, by means of the aforesaid representation, was induced to accept, and actually did accept the bills, and paid the same when due to the holders, and that afterwards, having sold the said goods and merchandizes, a certain action was commenced by *Graham*, *Rigg*, and Co. against the plaintiff for the recovery of the proceeds, in which action they recovered judgment for 1645*l.* the amount of the proceeds, and 74*l.* for costs, whereby the plaintiff hath lost the security of the said goods and merchandizes for the re-payment of the amount of the bills, and had been forced to pay to *Graham*, *Rigg*, and Co. the sum adjudged to be paid to them, and hath also been forced to expend other monies in and about defending the said suit so prosecuted against him. Plea, first, not guilty of the said supposed grievances; secondly, that the defendants were not guilty of the said supposed grievances in the said declaration mentioned within six years next before the exhibiting of the bill of the plaintiff. To this plea there was a demurrer and

1820.

DYSTER *against* BATTYE.

and the causes assigned were, that although the cause of action in the declaration mentioned did not accrue upon the committing of the grievances therein mentioned, yet that the defendants had pleaded that they were not guilty within six years, instead of pleading that the causes of action did not accrue within that time. The case was argued at *Serjeants' Inn* at the sittings before last *Michaelmas* term, by

Barnewall, for the plaintiff. This plea does not, in the language of the statute, state that the plaintiff had "no cause of action" within six years, but merely that the defendants were not guilty of the grievances mentioned in the declaration within that time. Now, that may be substantially true, and yet the plaintiff may have had a cause of action within that period; for the gist of this action is not the false representation which was made by the defendants, but the damage which resulted therefrom. It is clear, upon these pleadings, that the term grievance applies only to the wrongful act done by the defendants, and does not comprehend the consequential damage. For the declaration commences by stating, "that before the committing of the grievances thereinafter mentioned." The term grievance, therefore, means an act committed by the defendants, and that in this case was the false representation. This plea, therefore, denies that the false representation was made within six years, but it does not deny that the damage accrued within that time. Until a damage accrued from the false representation, the plaintiff had no cause of action whatever, *Roberts* v. *Read*. (*a*) It is sufficient, however, upon special demurrer, to say, that the word grievance is a word of doubtful import, and

(*a*) 16 *East*, 215.

that

1820.

DYSTER against BATTYE.

that by using this form of pleading, the defendants do not clearly shew to the Court that the plaintiff had no cause of action within six years. The old precedents of pleas of the general issue in actions on the case, or of the statute of limitations, do not contain the word grievance, or any word equivalent to it. In trespass, the plea is, not guilty of the trespass: and in actions on the case, founded in tort, the general form is, not guilty of the premises, or that the cause of action did not accrue within six years. And he referred to 3 *Inst. Cl.* 270. *Winch's Ent.* 83. *Vid. Ent.* 56. *Rast. Ent.* 124.

Puller, contrà. If the argument on the part of the plaintiff prevail, the common form of pleading not guilty of the grievances is bad upon special demurrer. The term grievance, however, is sufficiently large to comprehend both the wrongful act done, and the resulting damage. For, until a damage result to the plaintiff from the wrongful act, it does not become a grievance to him, In a case tried at the last *London* sittings (*a*), a similar question arose in an action of assumpsit. More than six years had elapsed since the contract was broken; but the damage had accrued within that period. My Lord Chief Justice was of opinion, at nisi prius, that the statute of limitations began to run from the time of the breach of the contract, and not from the time of the happening of the damage. In *M'Fadzen* v. *Olivant* (*b*), the plaintiff declared that the defendant had made an assault upon his wife and seduced her, whereby the plaintiff was deprived of the comfort and society of his wife; the defendant pleaded not guilty of the premises within six years. It

(*a*) *Battley* v. *Faulkner*, ante, 288. (*b*) 6 *East*, 387.

was

1820.

Dyster *against* Battye.

was contended, upon a general demurrer, that the plea ought to have been that the cause of action did not accrue within six years, because the gist of the action was the consequential damage, viz. deprivation of society. Lord *Ellenborough*, however, is reported to have said, that the cause of action in those cases arose from the time of the injury done by the defendant, by the corruption of the body and mind of the wife; for from that time she is less qualified to perform the duties of the marriage state. That case, therefore, is an authority to shew that the statute of limitations begins to run from the time of the act done by the defendant, and not merely from the time of the happening of the consequential damage.

Cur. adv. vult.

Abbott C. J. in the course of this term delivered the judgment of the Court. This case was argued before us at *Serjeants' Inn*, before *Michaelmas* term. It being then supposed that some matter applicable to this case might arise on the argument of another cause on a motion for a new trial, upon a question regarding the effect of the statute of limitations, we postponed giving our judgment in the present. The other cause has been since argued and decided, but it is not necessary now to pronounce, whether our judgment given therein be or be not applicable to the present case; because we are all satisfied that the plea in this case is bad. By the statute 21 *Jac.* 1. *c.* 10. *s.* 3., it is enacted, that "all actions upon the case (other than for slander) shall be brought within six years next after the cause of such actions or suit, and not after." And from the passing of the statute to the present case, the invariable form of pleading the

sta-

1820.

DYSTER *against* BATTYE.

statute to an action upon the case for a wrong (as this action is) has been to allege, that the cause of action did not accrue within six years next before the commencement of the suit. It is important to the administration of justice, that the usual and established forms of pleading should be observed, in order that the parties to the suit may know, with certainty, what is the point intended to be tried, and that the judge and jury may not be perplexed at nisi prius, by controversy and argument, upon the effect and import of the issue joined on the record. The import of this plea is doubtful, and was made the subject of argument before us. If its import be really the same as an allegation, that the cause of action did not accrue within six years, there can be no reason assigned for a departure from the usual forms. And if its import be different, then it is not a plea warranted by the statute, and, certainly, it is not a good plea at the common law. Every plea ought to be certain; if it be argumentative and uncertain it is bad. We think this plea is bad on that ground, and therefore there must be judgment for the plaintiff.

Puller then applied for leave to amend, by pleading, that the cause of action did not accrue within six years. And, upon his stating that he had been misled by the precedents of pleas, of the general issue in actions on the case founded in tort, and that at the time of the argument the Court had not expressed any doubt as to the form of the plea, leave was given to amend on payment of costs.

1820.

KING, Esq. *against* The Company of Proprietors of the WITHAM Navigation.

A local drainage act provided, that the owners and proprietors of lands, (*by and at whose expence certain banks should be made for the purposes of the drainage*,) their heirs and assigns, should be *reimbursed* such expences, or such share thereof as should be ascertained by certain commissioners appointed under the act; and a subsequent act, which imposed an additional tax upon those lands, provided that such tax should not be payable until the repayment of such of the above expences as *the owners and proprietors of the said lands for the time being*, should make appear to the satisfaction of the commissioners to have been necessarily expended in making banks. The act also contained clauses, whereby tenants for life or in tail were especially enabled to borrow money, and to charge the lands with it, for the purpose of defraying the expences of making banks under these acts. *J. S.*, who had expended 800*l.* in making banks, afterwards sold his lands, without reserving to himself or taking any notice in the conveyance of the reimbursement above mentioned; and the commissioners having subsequently determined the amount of the reimbursement: Held, that the purchaser, and not *J. S.*, was entitled to receive it.

ASSUMPSIT. The case stated, that by a local act, 2 *G.* 3., entitled an act for draining and preserving certain low lands called the *Fens*, lying on both sides the river *Witham*, in the county of *Lincoln*, and for restoring and maintaining the navigation of the said river, from the high bridge in the city of *Lincoln* through the borough of *Boston* to the sea, certain commissioners were appointed, styled general commissioners, for the purpose of executing the works of drainage therein mentioned, and carrying into effect the other provisions of the said act. Under the authority of this act, it was intended that certain banks should be erected along or near the course of the river *Witham*, through the several townships, including, amongst others, the township of *Martin*, situated in a district called the *First District of Low Lands or Fens*, mentioned in the said act. It was further declared, that it should be lawful for the said general commissioners, or any seven or more of them, to charge, amongst other lands, all the low lands and fens in the said first district, with such equal yearly rates as to them should seem necessary for the purposes of such drainage, so as the same did not exceed one shilling

per

1820.

KING *against* The WITHAM Navigation Company.

per acre. The commissioners commenced, under the authority of the said act, the works of drainage therein mentioned, and which they partially executed; but the banks along or near the course of the river *Witham*, through the said townships before mentioned, were, amongst other of the said works, left undone, in consequence of the funds appropriated to the drainage not being sufficient for its completion. By the 37 *G.* 3., which was an act passed to embank and drain the open and unembanked lands and grounds lying between the *Dales head Dyke* and the river *Witham*, in the several townships before enumerated, all in the county of *Lincoln*, it was enacted, that for the draining, preserving, and effectually securing the said low lands from floods, the commissioners therein named should, as soon as conveniently might be after the passing of that act, embank the said low lands with good and sufficient banks, in the manner and of the dimensions therein expressed. A part of the works directed to be executed under this second act, consisted of a bank along or near the course of the river *Witham*, and it was provided that the directions therein contained for defraying the expences of making the said bank over the said low lands, along the course of the river *Witham*, should not preclude or prejudice *the owners and proprietors of lands respectively, by and at whose expence the said banks should be made, their respective heirs or assigns, from being reimbursed the said expences, or such share thereof as the said general commissioners appointed under* 2 *G.* 3., *at any of their meetings to be held for executing the said act, should allow to have been necessarily expended in making the said bank; but that such owners and proprietors, their respective heirs and assigns, should be*

 entitled

1820.

KING against The WITHAM Navigation Company.

entitled to be reimbursed the said expences, or such share thereof as aforesaid, out of the monies which at any time thereafter should be raised by the said general commissioners, under the authority of the 2 *G*. 3., for the further execution of the works of drainage therein directed, at such time or times, and in such proportion and form as in the judgment of the said general commissioners, should afford to the owners and proprietors of the said low lands to be embanked and drained by virtue of 37 *G*. 3. such and the like benefit and advantage, in respect of the said lands, as other owners and proprietors of lands lying on both sides of the said river *Witham*, either already had or should thereafter receive under the authority of the 2 *G*. 3., for or towards the making and erecting banks of the like nature, next the said river *Witham*, for the protection and defence of their said lands respectively. The expence of erecting the bank in the township of *Martin* was directed by the 37 *G*. 3. to be borne by the owners of the low lands there, by an acre-rate, not exceeding five pounds per acre. The works directed to be executed under this second act were completed, and the plaintiff, who was the owner of certain lands in *Martin*, improved by the said drainage, and which were liable to the expence of such works under the last-mentioned clause of that act, paid in discharge of such tax the sum of 800*l*. By the 52 *G*. 3. the company of proprietors of the *Witham* navigation, the present defendants, were incorporated, with power to improve the navigation of the river *Witham*. The said company engaged to execute certain of the works, which were to have been done by the general commissioners under the first-mentioned act, and, among others, the banks along

1820.

KING *against* The WITHAM Navigation Company.

along or near the course of the *Witham*. For the purpose of defraying the expence of completing the works, which were to have been executed by the said general commissioners, and other charges, a further tax of 1*s*. 6*d*. per acre was imposed upon these lands in *Martin*, and of 1*s*. per acre on the other lands there. And it it was provided, that this tax of 1*s*. 6*d*. per acre should not, nor any part of it, notwithstanding the provisions therein contained in relation thereto, attach upon the said lands or any of them, or accrue or become payable in respect thereof, until so much and such part of the charges and expences incurred in the making and correcting the bank of the said river *Witham* through the said several parishes and places of *Timberland*, *Timberland Thorpe*, *Walcot*, MARTIN, *Linwood*, and *Blankney*, should be paid and discharged *as the owners or proprietors of the said lands for the time being* should make appear to the satisfaction of the said general commissioners, was necessarily expended in making and erecting the said bank. And that all such monies, after the amount thereof should have been ascertained, as by the said act was directed, should be recoverable from the said company of proprietors, by such and the like ways and means as other monies due and owing from the said company could and might be recovered. After the banks and other works, erected under the 37 *G*. 3., had been completed, and the sum of 800*l*. paid by the plaintiff, viz. in the year 1804, the plaintiff sold and conveyed his low lands in the said parish of *Martin*, without reserving to himself, or taking any notice in such sale and conveyance of the compensation or reimbursement mentioned in the 37 *G*. 3. Long after such sale and conveyance, and after the passing of the third

 act,

1820.

KING
against
The WITHAM
Navigation
Company.

act, viz. in the year 1817, the general commissioners determined that the amount of the reimbursement to be paid in respect of the said low lands in *Martin*, sold by the said plaintiff, amounted to the sum of 470*l.* 9*s.*, and had been necessarily expended in making and erecting the bank mentioned in the said acts of the 2 *G.* 3. and 37 *G.* 3., and certified the same in writing accordingly. This determination and certificate were communicated to the company of proprietors, and payment of the said sum was demanded by the plaintiff some time in the year 1818. Notice was, at the same time, given to the company of proprietors, by the persons to whom the plaintiff had so sold and conveyed the said lands, and who have continued to be and still are the owners of the same, that they were entitled to receive the same sum, as being the owners of the said lands.

This case was argued last term, by *Denman* for the plaintiff, and *Balguy* for the defendants. For the plaintiff, it was urged, that the word "reimbursed" implied that the same persons who had paid should receive back a part of the money paid by them. And the hardship which would otherwise follow to tenants for life, and persons in a similar situation, was pressed upon the Court.

For the defendants, the words "heirs or assigns" were relied on, as shewing that the persons who, by succession, should come into possession of the lands, were those who ought to receive the compensation. And it was urged, that in the last act the words were "owners of the lands for the time being," which

strongly

1820.

KING against The WITHAM Navigation Company.

strongly corroborated this construction. And that there was no hardship on the plaintiff by this; for it was his duty to have made a suitable provision for it in the bargain made by him upon the sale of the lands in question.

Cur. adv. vult.

The judgment of the Court was delivered in the course of this term by

ABBOTT C. J. This was an action brought under certain local acts of parliament, to recover a sum of money in respect of an expence formerly incurred by the plaintiff, as the owner of certain lands, towards the making of a bank along a part of the river *Witham*. The plaintiff had sold the lands, and the question was, whether the money was payable to him or to the purchaser. At the trial, a special case was reserved for the opinion of the Court, setting forth some parts of the local statutes upon which the question arose. The case was argued last term. Before we gave our judgment, we wished to be furnished with copies of the acts. This has been done, and, upon consideration of their different provisions, we are of opinion, that the plaintiff is not entitled to the money for which the action has been brought. The first statute is an act of the second year of his present majesty, made for the drainage of certain fen lands on both sides of the river *Witham*, and for the improvement of the navigation of that river. By this act an annual tax, not exceeding one shilling per acre, was imposed upon lands in a very extensive district, comprising the lands in question. This act being found inadequate to all the purposes intended, another act was passed in the 37th year of his present majesty, for embanking and draining cer-

 tain

1820.

KING *against* The WITHAM Navigation Company.

tain open and unembanked lands in the several places therein mentioned, being part of the larger district comprised in the first act, and including, among others, the lands in question. By this second act a commission was appointed, and the lands were subjected to a single acre tax, not exceeding five pounds. The bank to be erected along the river *Witham*, in pursuance of this act, would be beneficial to the whole district comprised in the first act; and it was therefore provided by this second act, that the directions therein contained for making that bank should not preclude or prejudice the owners and proprietors of lands respectively by and at whose expence the said bank should be made and erected, their respective heirs and assigns, from being reimbursed such portions of the charges as the general commissioners, appointed under the first act, should admit and allow to have been necessarily expended in making the said bank; but that such owners and proprietors, their respective heirs and assigns, should be entitled to be reimbursed such share of the expences out of the monies to be raised by the general commissioners under the first act, at such time, &c. as should afford to the owners and proprietors of the lands to be embanked and drained under the second act, such benefit and advantage, in respect of the said lands, as other owners and proprietors of lands already had, or might thereafter receive, under the authority of the first act. In pursuance of this second act the bank was made, and the plaintiff paid the tax of 5*l.* per acre for the lands then belonging to him. After this the statute of the 52d year of his present Majesty was passed, whereby the defendants were incorporated for the purposes of completing the drainage and navigation intended by the first act. By this last act, a further annual tax is im-

1820.

KING *against* The WITHAM Navigation Company.

imposed upon the extensive district comprised in the first act; but it is specially provided, that such new tax shall not attach upon the lands embanked under the authority of the second act, nor become payable in respect thereof, until so much of the charges of making the bank under the second act shall be discharged, as the owners and proprietors of the said lands for the time being, shall shew to the general commissioners to have been necessarily expended in making the bank; all which monies, after the same shall be ascertained, shall be recoverable from the company of proprietors. In the year 1804, the plaintiff sold his lands, without noticing the expence incurred in making this bank. In 1817, the general commissioners ascertained the reimbursement to be made in respect of the lands so sold by the plaintiff, at the sum of 470*l.* 9*s.*, for the recovery whereof the present action was brought; but we are of opinion that the plaintiff is not the person entitled to receive this money. The second act speaks of the owners and proprietors of the lands, at whose expence the bank shall be made, their respective heirs and assigns, as the persons not to be prejudiced by, but entitled to reimbursement of the expence. These words, "heirs and assigns," are apt and proper, to denote the persons in whom the lands might happen to be vested at the time of the reimbursement made, by descent or conveyance, by act in law or by act in deed; and seem to import that the repayment of the expence should attach upon the land; and that the land, which undoubtedly was made subject to, or debtor for, the charge, should be creditor for the repayment; and that the commissioners should not be required to examine into titles and conveyances, but should make their repay-

1820.

KING *against* The WITHAM Navigation Company.

repayment to the person who should appear as owner of the land at the time of the repayment. And this interpretation is confirmed by the provision of the last act above noticed; for it will be difficult to find a reason for exempting the land from the new tax, in whatsoever hands it might be, until the former expence was repaid, unless the land itself, and not any former owner of it, was considered as the creditor for that expenditure. The only ground of doubt would arise from the case of payments made by a tenant for life, or other person having a partial interest in the land; but this doubt is removed by adverting to some of the enactments in the second act not noticed in the case, and by which tenants for life, or in tail, are specially enabled to borrow money to pay the heavy tax thereby imposed on their lands, and to charge the lands with the repayment, in favour either of the lender or of their own nominee, or executors, if they should advance the money out of their own pockets. For these reasons, we think a nonsuit must be entered.

Judgment for defendant.

VAWSER and Others *against* JEFFERY and Others.

Where a testator, having devised copyhold lands to *A.* for life, with different remainders over, and having surrendered them to the uses of his will, afterwards, in contemplation of marriage, conveyed his estates to trustees and their heirs, to secure a jointure to his intended wife, and subject to a term of 99 years for that purpose, to the use of himself in fee, and subsequently surrendered his copyhold lands to these uses: Held, that this did not amount to a total revocation of his will, but that the devisee took the copyhold land subject to the charge created by the settlement.

THE Lord Chancellor sent the following case for the opinion of this Court. *Guylott Cowherd* being seised or possessed of certain freehold and copyhold

estates,

1820.

VAWSER *against* JEFFERY.

estates, by his will duly executed, and dated *April* 24th, 1794, devised part of the estates, as well copyhold as freehold, to *David Cowherd*, for life, remainder to trustees, to support the contingent uses and estates thereinafter limited: remainder to the use of the heirs of the body of *David Cowherd*; and for want of such heirs, to the use of *Thomas Vawser*, his heirs and assigns for ever. There was also a second devise of other parts of the copyhold estate, to *Robert Vawser* the younger, (son of *William Vawser*) with similar remainders to the trustees, and the ultimate remainder to *Thomas Vawser*: and a third devise of part of the estate, copyhold as well as freehold, to *Robert Vawser* the younger, son of *Robert Vawser* the elder, with similar remainders, to the trustees, &c.; and the ultimate remainder to *Robert Vawser* the elder. And the testator devised to *Robert Vawser* the elder, and *Thomas Vawser*, and their heirs for ever, as tenants in common, all the residue of his real estate. The testator, on the day of the date of his will, surrendered his copyhold estates to the uses of his will, by indenture of lease and release, and settlement, dated 14th and 15th *February*, 1800, previous to the marriage of the testator with *Anna Budd*, reciting the intended marriage; and that it had been agreed, in order that a provision might be made for said *Anna*, in case said marriage should take effect, and she should happen to survive him, that he should charge and make liable his real estates after mentioned, with the payment of an annual sum or yearly rent charge of 300*l.*, by way of jointure for her during her life; and in case the same should not be sufficient for that purpose, that his executors or administrators should, within six months after his death, invest so much of his personal

VAWSER *against* JEFFERY.

sonal estate, that the interest or dividends, together with the rents and profits of the premises to be settled as aforesaid, should be sufficient to make up the jointure or annuity of 300*l*., which was to be in satisfaction of all dower and thirds at common law, or by custom, it was witnessed, that, in consideration of the intended marriage, and in performance of the said agreements, &c., *Guylott Cowherd* did bargain, sell, alien, release, and confirm, unto *Charles Lea Jeffery* and *Daniel Burley*, and their heirs, several freehold and copyhold estates, particularly described, to have and to hold, to them, their heirs and assigns, to their several uses, upon the trusts, and to and for the ends, intents, and under and subject to the several powers, provisoes, declarations, and agreements therein limited, expressed, and declared, and hereinafter mentioned, that is to say; to the use of the said *Guylott Cowherd*, and his assigns, for and during his natural life, without impeachment of waste, and with such power of leasing as hereinafter mentioned; and from and immediately after the decease of the said *Guylott Cowherd*, to the use, intent, and purpose, that the said *Anna Budd*, and her assigns, in case the intended marriage should take effect, and she should happen to survive her said intended husband, should, from and immediately after the decease of *Guylott Cowherd*, yearly receive, for the term of her natural life, for a jointure and in bar of dower and thirds at the common law, or by custom, one annual sum, or yearly rent charge of 300*l*.; and as to the said messuages or tenements, lands, &c., so charged and chargeable with the payment of the said annual sum or yearly rent charge of 300*l*., and the powers and remedies for recovery thereof, therein-before con-

contained, and subject thereto, to the use of the said *Charles Lea Jeffery* and *Daniel Burley*, their executors, &c., for the term of 99 years, from the decease of *Guylott Cowherd*, upon the trusts after declared, and from and after the expiration, or other sooner determination of the term, and subject thereto, in the mean time, to the use of *Guylott Cowherd*, his heirs and assigns for ever. The trusts of the term were declared to be for better securing to *Anna Budd* the said annuity of 300*l.*, and the trustees were required, by and out of the rents and profits, or by mortgage or sale, &c., to levy and pay the arrears of the annuity, &c., and then, upon trust, to permit the person and persons, who for the time being should be entitled to the freehold and inheritance of the premises, immediately expectant on the determination of the term, to receive the residue of the rents and profits; and it was provided, that in case the annual amount of the rents should not, at the death of *Guylott Cowherd*, be sufficient to produce the annuity, then the premises should be liable only to pay so much of the said annual sum of 300*l.* as the fair annual rents and profits should extend to pay, unless the personal estate of *Guylott Cowherd* should not be sufficient for providing for such deficiency; and when the purposes for which the said term was created, were fully performed, that the term was to cease and be void. The usual powers of leasing, and appointing new trustees, &c., were given, and, besides the general covenant for title, and further assurance, *Guylott Cowherd* covenanted with the trustees, for surrendering and assuring such parts of the premises as are copyhold, to the uses, upon the trusts, and for the intents and purposes, and under and subject to the several powers, provisoes, declarations,

1820.

VAWSER *against* JEFFERY.

clarations, and agreements before declared; and it was further declared, that if the rents, &c., should not be sufficient to pay the said annual sum, &c., the executors, &c. of *Guylott Cowherd* should, within six months after his decease, pay to the trustees such sum, out of his personal estate. A surrender was made by *Guylott Cowherd*, of the copyhold estates, to the uses of the settlement, pursuant to the covenant therein contained, viz. to the use of himself and his heirs, until the marriage, and after that, to the use of himself and his assigns, for his life, without impeachment of waste; and after his decease, to the use and purpose, that *Anna Budd* and her assigns, in case the marriage should take effect, and she should survive, should yearly receive, during her life, as a jointure, and in bar of dower, a yearly rent charge of 300*l.*, with certain powers and remedies for the recovering them out of the copyhold premises. And as to the said copyhold premises, so charged and chargeable with the payment of the said yearly rent charge of 300*l.*, and the powers and remedies for recovery thereof, and subject thereto, to the use of *Charles Lea Jeffery* and *Daniel Burley*, their executors, administrators, and assigns, for the term of 99 years, to be computed from the decease of *Guylott Cowherd*, and from thenceforth next ensuing and fully to be complete and ended, without impeachment of waste; upon the same trusts, and for the same intents and purposes, for securing the payment of the said annual sum, or yearly rent charge of 300*l.*, as are expressed in the said indenture of release or settlement; and from and after the expiration of the said term of 99 years, and subject thereto, in the mean time, to the use of *Guylott Cowherd*, his heirs and assigns, for

ever,

1820.

VAWSER *against* JEFFERY.

ever. In the month of *May*, 1801, *Guylott Cowherd* died, leaving *Anna*, his wife, surviving him, and without having had any issue. After his death, *David Cowherd Vawser*, and others, being the coheirs at law, and customary heirs of the testator, exhibited their bill in the High Court of Chancery, against the defendants, praying that the said settlement might be declared to have revoked the will of the said *Guylott Cowherd*, as to such copyhold estates.

Tindal, for the plaintiffs, made two points; first, that by the surrender to the uses of the marriage settlement, the estate which the testator had in the premises, at the time of making his will, was so altered, that there was nothing left in him, upon which the surrender to the use of the will and the will could operate. And, secondly, that the subsequent surrender to new uses, inconsistent with those in the former surrender, was an actual revocation of the will in the proper sense of that word. As to the first point, it is admitted, that if this were a case of freehold lands, the estate would be so far altered by the settlement, as to prevent the will from having any operation. *Lord Lincoln's* case (*a*), *Goodtitle* v. *Otway*, (*b*), and *Cave* v. *Holford* (*c*), are authorities on that point. Now the same rule will govern the case of copyhold lands. If, however, the Court should think, that *Thrustout* v. *Cunningham* (*d*), is an authority too strong to be overcome, still it may be contended, that, on the second point, that case is so distinguishable from this, as not to be of

(*a*) 1 *Eq. Cas. Abr.* 411. *Shower. Parl. Ca.* 154. *S. C.*
(*b*) 1 *B. & P.* 576. 7 *T. R.* 399. *S. C.*
(*c*) 2 *Ves. J.* 604. (*d*) 2 *Bl.* 1046.

1820.

Vawser *against* Jeffery.

of any importance. For these there could be no implied revocation, the will being made subsequently to the marriage. A will of copyhold lands is not within the statute of frauds. It may therefore be revoked by parol, as a will of freehold might have been previously to that statute. Now in 1 *Roll. Abr.* 614. O. *pl.* 1., and also *pl.* 4. *Ford*'s case (*a*), *Burton* v. *Gowell* (*b*), *Harrison*'s case (*c*), *Coke* v. *Bullock* (*d*), it is laid down, that, in such cases, wherever it can be collected from what the testator says or does that he intended to revoke it is a revocation of will in law. Now here there are strong circumstances, from which the Court may discover such an intention. First, it is clear, that there is a revocation of the will, as to the freehold, and both freehold and copyhold are coupled together by the testator. Then the uses of the settlement are quite inconsistent with those in the will, and besides the will affects to dispose of a present interest; and, from the settlement, it is clear, that at all events, it could operate only on the reversionary interest. There is also a power of sale given to the trustees, by which the whole, or part, at least, of the estate, might have been disposed of. Under these circumstances, it must surely have been the intention of the testator, when he executed the settlement, and surrendered subsequently to the uses under it, to have revoked his will. If so, the plaintiffs are entitled to the judgment of the Court.

Walton, contrà, contended, that this was only a revocation of the will, pro tanto, and that the estates given

(*a*) 1 *Sid.* 73. (*b*) *Cro. El.* 306.
(*c*) *Dyer*, 310. *b*. (*d*) *Cro. Jac.* 49.

by

1820.

VAWSER
against
JEFFERY.

by the will, passed, subject only to the charge created by the settlement. It is admitted, that there are cases which apply to freehold lands, which have decided that such a settlement as the present would have so far altered the estate as to prevent the prior will from operating upon it. But this depends on the technical construction given to the statute of wills, which provides, that a person having lands and tenements, may devise, &c. And if the estate has been altered, then he has not such lands and tenements, &c.; and, therefore, the devise is not valid. But the case of copyholds is very different; for, by the subsequent surrender to the uses of the settlement, no more passed than was required for carrying into effect those uses. The will, therefore, operates on the old use, left in the testator, who was still in, as of his old estate; and the technical rule as to freehold land does not apply. *Thrustout* v. *Cunningham*, and *Roe* v. *Griffiths* (a) are strong authorities in point. Then, as to the revocation, it is plain that the intention of the testator was not to revoke, he only meant to secure out of his estate a jointure, leaving the rest of his will untouched; and as to the revocation of the will, with respect to the freehold, it does not apply, for the revocation there depends not on his intention, but on a strict and perhaps harsh rule of law, operating contrary, in all probability, to his intention.

Cur. adv. vult.

The following certificate was afterwards sent.

THIS case has been argued before us, and we are of opinion, that the surrender made by *Guylott Cowherd*,

(a) 4 *Burr.* 1954.

1820.

VAWSER *against* JEFFERY.

of the copyholds, to the uses of his marriage settlement, did not revoke the surrender made to the use of his will, and the devise of such copyholds.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

OWEN *against* LEGH and BRODBELT.

A tenant, whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action upon the case under 2 *W. & M.* s. 28. *c.* 5., against the landlord or his bailiffs for selling the same before five days, or a reasonable time, have elapsed after the seizure, such sale being wholly void.

DECLARATION stated, that *Brodbelt* as bailiff of *Legh*, and by his authority, on 29th of *August*, 1818, at, &c., seized and took the standing corn, growing turnips, growing potatoes, cattle, goods, and chattels, to wit, &c., of the plaintiff, of great value, to wit, of the value of 1000*l*., then found and being in and upon a certain messuage, farm, lands, and premises, situate at, &c., in the name of a distress for certain arrears of rent pretended to be due and payable for the same to *Legh*, and then and there gave notice thereof to the plaintiff; yet that the said defendant, afterwards and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, and before a reasonable, proper, and convenient time in that behalf had elapsed, to wit, on, &c., at, &c., unlawfully did sell and dispose of the said cattle, standing corn, &c., without the leave or licence, and against the will of the said plaintiff, whereby he was not only hindered from replevying the same, but also deprived of reasonable time for raising money to pay the rent and the costs of the distress,

8 and

1820. Owen *against* Legh.

and also lost the cattle, standing corn, &c., and the use thereof. The second count only stated a seizure of standing corn, growing turnips, and growing potatoes, and a sale before the expiration of five days. Plea, general issue. The cause was tried at the last Spring assizes for *Chester*, when it appeared that a distress had been made by the defendants, one of whom was the landlord of the plaintiff, on *Saturday*, *August* 29th; and that the sale of the goods distrained took place on the *Tuesday* following, which was admitted to be a day too soon (*a*), and a violation of the statute 2 *W.* & *M. sess.* 1. *c.* 5. *s.* 2. The damages were assessed, not merely in respect of the goods and chattels so sold, but were also increased in respect of the standing corn and growing crops of turnips, which were sold before they were ripe. The jury found a verdict for the plaintiff, damages 90*l.* *D. F. Jones*, in last *Easter* term, obtained a rule nisi, either for a new trial, or for a reduction of the damages to 50*l.*, being the amount applicable to the sale of the goods and chattels only; and he contended that the evidence as to the loss resulting from the sale of the standing corn and growing crops, was improperly received under the declaration as framed. By 2 *W.* & *M. sess.* 2. *c.* 5. growing crops could not be distrained; and the power given by the 11 *G.* 2. *c.* 19. *s.* 8. was modified by different provisions. This sale, therefore, was not authorised by either act, and no replevin was necessary. Besides, the declaration does not charge any grievance within 11 *G.* 2.; for it is not alleged that the crops were not ripe, or that they were appraised after they were cut,

(*a*) *Wallace* v. *King*, 1 *H. Bl.* 13.

1820.

Owen *against* Leigh.

or that they were sold before they were appraised. The record here supposes the same provisions to be applicable to standing corn, under the 11 *G.* 2., and to goods and chattels, under 2 *W.* & *M.* But the provisions and the damage are altogether different. The damage, in the one case, is the curtailing of the chance of replevying; and in the other, is the bringing of the crops to sale under circumstances of disadvantage and loss.

Cross Serjt. and *Cottingham* shewed cause, and contended that by 11 *G.* 2. *c.* 19. *s.* 8. the seizure of the standing corn was lawful, by the landlord, for rent in arrear; and by the latter part of that section, it is directed, that they are, in a convenient time, to appraise, sell, or otherwise dispose of the same, in the same manner as other goods and chattels. If so, as it is admitted, that the damage stated in the declaration would be sufficient in the case of other goods and chattels, it is so in this case.

J. Williams and *D. F. Jones*, contrà. The sale here was wholly void as to the standing corn; for it cannot be sold till after an appraisement, and no appraisement can be made till it is ripe. Then, if the sale be void, the plaintiff has not sustained any damage from the act of sale; for nothing passed by it, and there was no necessity for any replevin on his part.

They were then stopped by the Court.

Abbott C. J. It seems to me at present, that the sale of the standing corn was unauthorised, and that no necessity ever existed for replevying it. Now, the plaintiff has stated this as his damage in his declaration,

and

and has recovered damages in part on that account, which he ought not to have done; for notwithstanding this sale, it was clearly competent under 11 *G.* 2. *c.* 19. *s.* 8., for the tenant, at any time before the corn was ripe, to have tendered the rent due; and if, after that, the landlord had taken the corn, he might have been proceeded against as a trespasser. We will, however, forbear giving our final judgment on this case at present, recommending the parties, in the mean time, to arrange the matter between themselves.

Cur. adv. vult.

The cause having stood over till this term, and the parties not having come to an agreement,

ABBOTT C. J. now delivered the judgment of the Court. We are of opinion, in the present case, that the plaintiff has no good cause of action, as to that part of the first count of the declaration, in which he complains of the sale of the standing corn and growing crops having been made before a reasonable time had elapsed; for the sale being altogether void, the plaintiff sustained no legal damage from it, and has therefore no ground of action in respect of it. The rule, therefore, for a new trial must be made absolute, unless the plaintiff shall consent to reduce the damages to the sum of 50*l.*; and, in that case, the verdict must be entered on that part of the first count which relates to the sale of the goods and chattels only.

Rule accordingly.

1820.

Doe, Dem. Wright, *against* Elizabeth Plumptre.

To avoid a fine, a husband claiming in right of his wife, must enter within five years after his title accrues. By deed an estate was settled, after several preceding estates tail, to the use of all and every the nearest of kin, in equal degree, to *D. M.*, at the time of her decease without issue of the name of *Brewer*: Held, that a person, who at the time of *D. M.*'s death was her nearest of kin, born with the name of *Brewer*, but who was not her nearest of kin, and who had, previous to *D. M.*'s death, married and assumed her husband's name, was not entitled to take under this clause in the deed.

THIS was an ejectment tried before *Best* J. at the last assizes for the county of *Somerset*. The plaintiff, in right of his wife, claimed a moiety of the estate in question under a deed of settlement, whereby Mrs. *Mary Molyneux*, whose maiden name was *Brewer*, being seised in fee of the manor of *Pauleton* with its appurtenances, and having two daughters *Diana* and *Mary Molyneux*; on the marriage of the latter with *Thomas Bury* in *August* 1748, conveyed the same to various trusts for the benefit of the husband and wife and their issue, and after the death of the survivor of them, and in default of such issue, the remainder, as to one moiety, to the use of *Diana Molyneux* for life; remainder to trustees, to preserve contingent remainders; remainder to the use of the first and other son and sons of *D. Molyneux* in tail; remainder to the use of her daughters as tenants in common, in like manner; remainder to the use of all and every *the nearest of kin in equal degrees to* D. Molyneux *at the time of her death without issue of the name of* Brewer, *share and share alike as tenants in common, and not as joint-tenants*, their heirs and assigns for ever. *D. Molyneux*, on the death of her sister, Mrs. *Bury*, without issue, entered into possession of the whole estase, and held the same until her death in 1805, without ever having been married, and by a codicil to her will she devised the estate to trustees to sell, and after paying 6000*l.* to one *Morley* out of the produce, the

sur-

1820.

DOE *against* PLUMPTRE.

surplus was to go to the defendant. The defendant, with the consent of the trustees, entered upon the whole estate, and levied a fine with proclamations in *Hilary* term, 1806. The plaintiff proved the pedigree of his wife, whose maiden name was *Brewer*, and that at the time of *D. Molyneux*'s death, she was the nearest of kin born of the name of *Brewer*. Before the death of *D. Molyneux*, however, the plaintiff had married his present wife, and, subsequent to such marriage, she had always passed by his name. It also appeared that a Mrs. *Morley* was more nearly related to *D. Molyneux* than the wife of the lessor of the plaintiff. It was contended at the trial, by the defendant's counsel, that the plaintiff was barred by the fine levied in 1806, and the learned Judge was of opinion, that although the wife of the lessor of the plaintiff, if she survived him would be entitled to enter within five years after his death, yet that her husband not having made an entry or brought his action within the time prescribed, was barred by the fine, and he therefore directed the jury to find a verdict for the defendant. *Pell* Serjt. in last *Michaelmas* term moved for a new trial upon two grounds, first he contended that the husband who claimed in right of his wife might enter at any time during the coverture. It was clear that an infant, by his guardian, might avoid a fine by an entry at any time during his infancy, and by parity of reason a husband, claiming in right of his wife, may avoid the fine during the coverture, for the wife's interest is kept alive during the whole period of the coverture. (*a*) Upon this point the Court were clearly of opinion, that the husband,

(*a*) 1 *Leon.* 215.

1820.

Doe *against* Plumptre.

not having entered within the five years after his right accrued, was barred by the fine, and *Bayley* J. referred to *Hulm* v. *Heylock* (*a*) where this same point was decided. *Pell* Serjt. then urged that if Mrs. *Wright* was entitled under the deed to a moiety of the estate, as the nearest of kin of the name of *Brewer*, she became, immediately on the death of *D. Molyneux*, tenant in common with the defendant, and that as the possession of one tenant in common was the possession of the other, Mrs. *Wright* was in possession immediately on the death of *D. Molyneux*, by the holding of the defendant as her companion in right. (*b*) The fine, therefore, having been levied by one of two tenants in common could not bar the right of the other. *Best* J. said that that point had not been made at the trial; and if it had he should certainly have directed a verdict for the plaintiff, subject to the opinion of the Court upon the construction of the will. For the plaintiff had satisfactorily made out that his wife was, at the death of *D. Molyneux*, the nearest of kin, entitled, by birth, to the name of *Brewer*. The Court then said, that as the verdict had proceeded upon a mistake as to the operation of the fine, they would grant a rule nisi for a new trial, in order to have the question, as to the construction of the will, discussed. The case was argued at the sittings before this term at *Serjeants'* Inn, by

Casberd, *Moore*, and *W. P. Taunton*, for the defendant. To entitle the lessor of the plaintiff to recover, it is necessary for him to shew, that Mrs. *Wright*, at the

(*a*) *Cro. Car.* 200.

(*b*) See *Ford* v. *Grey*, *Salk.* 285. *Smales* v. *Dale*, *Hob.* 120. *Peaceable* v. *Reed*, 1 *East*, 568. *Doe* v. *Pearson*, 6 *East*, 173.

time

1820.

DOE *against* PLUMPTRE.

time of *D. M.*'s death, was the nearest of kin of the name of *Brewer*. She must answer the entire description; that is, she must be the nearest of kin, and have the name of *Brewer*. *Brown* v. *Peys* (*a*) is an authority in point. If the argument on the part of the defendant prevail, the effect will be that the estate will go to a person who answers neither part of the description; for Mrs. *Morley* was the nearest of kin at the time of *D. M.*'s death, and the wife of the lessor of the plaintiff bore the name of *Wright*, and not that of *Brewer*. In *Bon* v. *Smith* (*b*), a man having issue a son and daughter, devised to his son in tail, remainder to the next of his name, the son died without issue, the daughter being then married; and it was held that the daughter, having lost her name by her marriage, the estate should go to the next heir male of the name, although, if she had not been married at the time of her brother's death, the daughter should have had it; for she was the next of the name. In *Jobson*'s case (*c*), the testator devised his estate in tail, the remainder to the next of kin of his name; at the time of the devise, the next of kin was his brother's daughter, who was then married to *J. S.*; and it was adjudged, upon special verdict, that the daughter should not take, she not being of the devisor's, but of her husband's name. The principle established in these cases is consistent with the rule laid down in *Co. Litt.* 24. *b.* (*d*). "If *A.* have issue, a son and daughter, and a lease for life be made, the remainder to the heires female of the bodie of *A.*; *A.* dieth, the heire female can take nothing, be-

(*a*) *Cro. Eliz.* 357.
(*b*) *Cro. Eliz.* 532.
(*c*) *Cro. Eliz.* 576.
(*d*) See note, 145.

cause

cause she is not heire: for she must be both heire and heire female, which she is not, for the brother is heire; and, therefore, the will of the giver cannot be observed, because here is no gift; and, therefore, the statute cannot worke thereupon." In *Pyot* and *Pyot* (*a*), the testatrix devised her real and personal estates to trustees in trust for the nearest relation of the name of the *Pyots*. Lord *Hardwicke*, in delivering his judgment, laid great stress upon the circumstance of its being a devise of personal as well as real estate, and held that the *Pyots* were to be taken as nomen collectivum, and descriptive of the particular stock, and that change of name by marriage did not exclude. In this case the devise is of the real estate only. In *Leigh* v. *Leigh* (*b*) the devise over was in these words: "Unto the first and nearest of my kindred, being male, and of my name and blood, that shall be living at the determination of the several estates hereinbefore devised, and to the heirs of his body lawfully begotten." It was held that the party taking under this devise must be of the name, as well as of the blood, and that the qualification as to the name was not satisfied by a person having taken the name by the king's licence previous to the determination of the preceding estates.

Pell Serjt., *Gaselee*, and *Adam*, contrà. The intention of the settlor was, that his nearest of kin, who had the name of *Brewer* by inheritance at the time of *D. Molyneux*'s death, should take. It is not necessary, therefore, for the plaintiff to shew that his wife was the nearest of kin, and that she also bore the

(*a*) 1 *Ves.* 335. (*b*) 15 *Ves.* 92.

name

name of *Brewer*. If *D. M.* had died previous to Mrs. *Wright*'s marriage, the latter would have clearly answered the description; and, if so, the question is, whether by marriage she absolutely lost her maiden name. For some purposes she may perhaps have lost her name; but not for all: and *Pyot* v. *Pyot* is an authority to shew that, for the purpose of taking under a deed or devise, she did not lose her former name. It does not follow that a woman acquiring another name by marriage, therefore absolutely loses her former name. In *Leigh* v. *Leigh* it was held that a man, by taking another name under the king's licence, did not thereby lose his former name, and that a name taken that way is by voluntary assumption, and that a legacy given by the former name might be taken. The taking of the name of the husband by the wife is a matter of mere private arrangement. In many countries married woman retain their maiden names; and even in this country, women of a certain rank marrying their inferiors retain their former names and titles; the use then of the name of the husband, is a mere voluntary assumption, and does not take away the former; and if that be so, Mrs. *Wright* comes within the words of the limitation. As to the authorities, Lord *Hardwicke* expressed himself dissatisfied with the decision in *Jobson*'s case, and in *Pyot* v. *Pyot*, he considered words nearly similar to those used in the present case as describing the stock, and he expressly held the change of name by marriage to be immaterial; that case, therefore, is a strong authority in favour of the plaintiff's claim.

ABBOTT

1820.

Doe *against* Plumptre.

Abbott C. J. The case has been very well argued. The limitation will admit of four different constructions: first, it may require the union of the two characters, viz. that the party taking should be the nearest of kin, and should also have the name of *Brewer*; or, secondly, that the party taking should be the nearest of kin of the stock and blood; thirdly, if taken according to the very letter, that he should be nearest of kin at the death of *D. M.*, bearing the name of *Brewer*; or, lastly, that he should be the nearest of kin at the death of *D. M.*, *born* of the name of *Brewer*. The latter interpretation alone would entitle the present plaintiff to recover.

Cur. adv. vult.

Abbott C. J., in the course of this term, delivered the judgment of the Court. This case, which came on by way of motion for a new trial, was lately argued before us at *Serjeants' Inn Hall*. We disposed, at that time, of several points raised in argument before us, and reserved our judgment upon one alone, which arises in the following manner:

Mrs. *Mary Molyneux*, widow, whose maiden name was *Brewer*, being seised in fee of the entirety of a considerable estate, and having two daughters named *Diana* and *Mary Elizabeth*, and no other issue, executed a deed by way of settlement of the estate, in contemplation of a marriage then intended between her daughter *Mary Elizabeth* and a gentleman named *Bury*. By this settlement, one moiety of the estate was settled, after the death of the settlor, upon her daughter *Mary Elizabeth*, for life; with remainder to her

first

first and other sons by her then intended husband, in tail male; with remainder to all and every her daughters by her then intended husband, as tenants in common, in tail general; with remainder to the daughter *Diana* for life; with remainder to the first and other sons of *Diana*, successively, *in tail male;* with remainder to all and every the daughters of *Diana*, as tenants in common, in tail general; with remainder, (upon which the question arises,) "to the use and behoof of all and every the nearest of kin, in equal degree, to the said *Diana*, at the time of such her decease without issue, of the name of *Brewer*, share and share alike, as tenants in common, and not as joint tenants, their heirs and assigns for ever." The intended marriage took effect; and afterwards *Mary M.*, the settlor, and also *Mary Elizabeth Bury*, died without issue, in the lifetime of *Diana*, who thereupon became seised of this moiety, under the settlement. She afterwards obtained the other moiety, under the will of Mr. *Bury*, who had taken it in fee, by virtue of the limitations applicable thereto in the settlement, and died seised of the whole, without having ever been married, having by her will devised the whole to the defendant. The ejectment was brought for the recovery of the moiety settled upon *Diana* in remainder, as before mentioned, by Mr. and Mrs. *Wright*, claiming in behalf of Mrs. *Wright*, whose maiden name was *Brewer*. Mrs. *Wright* was born after the date of the settlement, and was married to Mr. *Wright* before the death of *Diana*. She was, at the death of *Diana*, her next of kin of all persons whose surname was *Brewer;* but she was of a more remote degree than a Mrs. *Morley*, the surname of whose deceased

1820.

Doe against Plumptre.

deceased mother was *Brewer*; and she had, as is usual in *England*, parted with her surname on her marriage, and been always called by the name of her husband. At the close of the argument, it was intimated by the Court that the obscure language of this limitation, to persons who were to take as purchasers, might possibly admit of several constructions, which were then mentioned; but that the only construction which would give a title to Mrs. *Wright* upon the facts found must be, to consider the words as giving the estate to such person or persons, whose *original* surname was *Brewer*, as should, of all that class of persons, be the next of kin to *Diana* at the time of her death. No authority was cited in support of such a construction; and it was properly objected on the other side, that the effect of it would, in the present instance, be to give the estate to a person who did not fall within any part of the description contained in the words of the deed; Mr. *Wright* not being the next of kin, nor being of the name of *Brewer*. And, upon consideration, we are of opinion that Mrs. *Wright* is not entitled, because, if the word "name" is to be understood in its primary sense, she was not, at the death of *Diana*, a person of that name; and if it is to be understood in a figurative sense, as denoting a house, family, or stock, then there was another person of that description, who was nearer of kin. We forbear to intimate any opinion, as to the sense in which this word ought to be taken, and also upon a question much debated in the argument, namely, whether both parts of the description, that is, nearest of kin and name of *Brewer*, must concur in the same individual; because it is not necessary to decide

either

1820.

DOE *against* PLUMPTRE.

either of those points, in the present case, and because we do not choose to influence any question that may hereafter be made between other parties, or to give encouragement to any other claimant.

Judgment for the defendant.

1820.

MEMORANDA.

On *Saturday*, *Jan.* 29, His Majesty King *George* III. died; and on the sitting of the Court on the *Tuesday* following, the Judges and the King's counsel took the oaths of allegiance, &c. to His present Majesty. By the 57 *G.* 3. *c.* 45. persons holding any *office*, *place*, or *employment*, civil or military, were, at the demise of His Majesty, to continue to hold the same without any new patents, &c. The patents of precedence not being mentioned in this act, expired; and Mr. *Casberd*, during the remainder of the term, sat without the bar.

In the course of this term, *Thomas Peake*, Esq., of *Lincoln's Inn*, was called to the degree of Serjeant at Law. The motto on his rings was *Æquâ Lege*.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the First Year of the Reign of GEORGE IV.

ON the first day of this term, Messrs. *Fonblanque* and *Jervis*, whose patents of precedence had expired by the demise of the Crown, took their seats again within the bar with their former rank, having had fresh patents of precedence granted to them in the course of the last vacation. Mr. *Casberd*, on the same day, took his seat again within the bar, as one of His Majesty's Counsel learned in the law.

On the third day of the term, *Henry Brougham*, of *Lincoln's Inn*, Esq. having been appointed Attorney-General, and *Thomas Denman*, of *Lincoln's Inn*, Esq. having been appointed Solicitor-General, to Her Majesty the Queen, took their seats within the bar, with the rank belonging to their respective offices.

1820.

Thursday, April 20th.

BURTON *against* CHATTERTON.

A charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill, within 2 *G.* 2. *c.* 23. *s.* 23. as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued.

ACTION for an attorney's bill. At the trial before *Abbott* C. J. at the *Middlesex* sittings after last *Michaelmas* term, the plaintiff was nonsuited for want of delivery of a bill, pursuant to the stat. 2 *G.* 2. *c.* 23. *s.* 23. The items on which it was contended that the bill came within the statute, were, charges for drawing an affidavit of debt and bond to the Chancellor, in order to obtain a commission of bankruptcy. The affidavit was never sworn, nor the commission issued. *Marryat*, pursuant to liberty reserved at the trial, obtained in *Hilary* term a rule nisi for setting aside the nonsuit and entering a verdict for the plaintiff for the amount of the bill.

Platt shewed cause, and contended, that these items were taxable under the statute, and he cited *Collins* v. *Nicholson* (*a*), where the obtaining of the Lord Chancellor's signature to the bankrupt's certificate was held to constitute a charge within the statute; and *Ex parte Prickett* (*b*), where a charge for a dedimus potestatem was held sufficient to warrant the taxing the rest of the bill, which contained charges for conveyancing. In *Winter* v. *Payne* (*c*), it was held that taking instructions to commence an action, drawing and engrossing affidavit of debt, attending the swearing of the same, and paying for the oath, were taxable items within the statute: and the only distinction between that case and

(*a*) 2 *Taunt.* 321. (*b*) 1 *New Rep.* 266.
(*c*) 6 *T. R.* 645.

this

1820.

BURTON *against* CHATTERTON.

this is, that the affidavit was there actually sworn. In *Sandom* v. *Bourn* (*d*) it was held, that a bill was taxable which contained a charge for the preparing of a warrant of attorney, with a view to business to be done in court. Upon these authorities, therefore, the present bill was taxable; and the nonsuit was right.

Marryat and *Chitty*, contrà, were stopped by the Court.

ABBOTT C. J. On further consideration, I am satisfied that the nonsuit in this case was wrong. There does not appear to be any method by which these items could be taxed. They are not within the words of the statute, which speaks only of charges or disbursements at law or in equity. The case of *Winter* v. *Payne*, and *Ex parte Prickett*, are distinguishable; for in the former the affidavit of debt was sworn, and the latter is clearly a proceeding in a real action. If this commission had actually issued, there is a special provision made by the 5 *G.* 2. *c.* 30. for the taxation of the bill at a meeting for the appointment of assignees by the commissioners, and after that period by a Master in Chancery; and I believe that where a commission has issued, which has not been proceeded in up to the choice of assignees, the Lord Chancellor has directed a Master in Chancery to tax the bill. Here, however, no commission was issued, nor was there even any application for it. We ought to be quite satisfied before we nonsuit a plaintiff upon this ground, that there was some authority to which these items could have been

(*a*) 4 *Campb.* 68.

1820.

BURTON *against* CHATTERTON.

referred for taxation. I am not satisfied of that; and am, therefore, of opinion, that this nonsuit ought to be set aside, and a verdict entered for the plaintiff.

BAYLEY J. I am of opinion that this case is not within the statute. All the authorities referred to in argument, with the exception of *Sandom* v. *Bourn*, are perfectly distinguishable from the present case. For a charge for the obtaining of a bankrupt's certificate falls within the words "charges at law or in equity." So a charge for the swearing an affidavit to hold to bail, and for the writ of dedimus potestatem, are charges at law, and, therefore, clearly within the statute. The case of *Sandom* v. *Bourn* certainly does not range within these authorities. But that was only a decision at nisi prius; and whenever that question shall arise, it will be sufficient to give my opinion respecting it. In the mean time, I think it not sufficient to govern the present case.

HOLROYD J. The first impression on my mind was, that this was part of a proceeding at law, relating to a commission of bankrupt, which is authorized by statute, and is, therefore, a proceeding at law, and not in equity. If it had gone on to the extent of swearing the affidavit, it would have been a proceeding at law or in equity: but it did not go far enough, and, therefore, as it seems to me, does not come within the words of the statute.

BEST J. The case of *Sandom* v. *Bourn* is not easily distinguishable from the present. But that was a mere nisi prius decision, and ought not to govern us sitting

in

1820.

BURTON *against* CHATTERTON.

in bank. This case does not appear to me to fall either within the words or spirit of the act of parliament; for a party cannot properly be said to proceed, either at law or in equity, until something be done by him under the authority of a Court. I am, therefore, of opinion, that this nonsuit ought to be set aside, and a verdict entered for the plaintiff.

Rule absolute.

DOE, dem. of S. PERKES, *against* E. PERKES and Others.

Friday, April 21st.

A testator being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm; and having put by the several pieces, he expressed his satisfaction that no material par of the writing had been injured, and that it was no worse: Held, that it was on these facts properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court refused to disturb the verdict, and supported the will.

EJECTMENT for messuages and lands in the parish of *Walsall*. Plea, not guilty. At the trial before *Holroyd* J. at the last assizes for the county of *Stafford*, it was admitted that the lessor of the plaintiff, as the brother and heir at law of one *Charles Perkes*, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one *Joseph Worrall*, that in *August*, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to *Worrall*, "*Joe*, you shall see if I have done any thing for the rascal or not. I have made

 him

1820.

Doe *against* Perkes.

him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands together, as if in an attitude of prayer, and said, "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned Judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will, and now

W. E. Taunton moved for a new trial, and contended that the cancellation was complete by the tearing of the will with the intent to destroy it, and he cited *Pemberton* v. *Pemberton* (*a*), *Bibb* v. *Thomas* (*b*), *Hyde* v. *Hyde* (*c*), and *Onions* v. *Tyrer*. (*d*)

Abbott C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under

(*a*) 13 *Ves. jun.* 290. (*b*) 2 *Black.* 1043.
(*c*) 1 *Eq. Cases Abr.* 403. (*d*) 1 *Peere Williams*, 343.

his

his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bye-stander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no further, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now, if the cancellation had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

Bayley J. I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped in medio, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

1820.

Doe *against* Perkes.

Holroyd J. I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set up the will again. The statute of frauds says, "that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the same by the testator, &c." but, in order to effect this, the act of tearing, &c. must be complete. I left it to the jury to say, whether that was so, and they were of opinion, that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

Best J. I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation; for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no further, and that the cancellation was complete; but here there is evidence, that he intended to go further, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in *Blackstone* is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

6

Rule refused.

1820.

Robson *against* Spearman and Another.

Saturday, April 22d.

A warrant for the commitment of the putative father of a bastard child, until he should pay a sum due for the maintenance of the child and legal accustomed fees, or until he should be otherwise delivered by due course of law, is bad, the magistrate not being authorised under 49 G. 3. c. 68. s. 3. to make such a warrant.

THE declaration stated that defendants made an assault upon the plaintiff, and seized, &c. and imprisoned him, without reasonable cause, in a certain gaol, &c. for six days, and until he paid a large sum of money. Plea, not guilty. At the trial at the last Spring assizes for *Northumberland*, before *Bayley* J., it appeared that the plaintiff, against whom a regular order of filiation had been previously made, had been committed by the warrant of the defendant *Spearman*, who was a magistrate, for not having paid the arrears due under that order. The warrant being produced, appeared to be for the commitment of the plaintiff to the gaol of *Morpeth*, *until he should pay the sum due and legal accustomed fees, or until he should be otherwise delivered by due course of law.* The plaintiff having been imprisoned six days, paid the money, and was discharged. It also appeared, that the notice which was given to the defendant *Spearman*, pursuant to the statute 24 *G.* 2. *c.* 44., after reciting the arrest and imprisonment of the plaintiff, and that he was compelled to pay a sum of money in order to obtain his discharge, stated that *a precept called a latitat* would be issued against him for the said imprisonment and sum of money. It was contended for the defendants, that this notice was insufficient; but the learned Judge overruled this objection, and being also of opinion that the warrant was illegal, inasmuch as by the 49 *G.* 3. *c.* 68. *s.* 3. the magistrate was empowered only to commit for three months, unless the money be sooner paid (whereas here the

1820.

ROBSON *against* SPEARMAN.

the commitment was general, being until he should pay the money), he directed the jury to find a verdict for the plaintiff against the defendant *Spearman*. The other defendant, who was the constable who executed the warrant, had a verdict. And now

Cross Serjt. moved to enter a nonsuit. Here the defendant was discharged, in point of fact, within the three months for which, by the 49 G. 3. *c.* 68. he might have been committed. If he had been detained beyond that period under the warrant, he might have had some ground for the action. On the second point, he cited *Strickland* v. *Ward*. (*a*) Here the notice given was of an action against the magistrate alone, and it was stated to be for the said imprisonment and sum of money. The action commenced was for assault, battery, and false imprisonment, and was a joint action against the magistrate and constable.

ABBOTT C. J. I am of opinion that the warrant in this case was illegal, not being such as the justice had authority to make. It was his duty to have pursued the words of the statute of the 49 *G.* 3. *c.* 68. If he had so done, it would have given the party committed the option either of paying the money or of staying three months in prison, and being thereby altogether discharged from the payment. This warrant is for his imprisonment till he shall pay the money, and deprives the party of that advantage. The difference is a most material one, and it gives the party committed a right of action against the magistrate. There does not

(*a*) 7 *T. R.* 651.

appear

1820.

ROBSON *against* SPEARMAN.

appear to me any weight in the other objection. The only effect which the omission of any mention of a battery in the notice could produce, would be to prevent the plaintiff at the trial from giving evidence of a battery. It was, however, quite sufficient to apprise the magistrate of the nature of the action about to be brought against him, so as to have enabled him, if he had thought proper, to have tendered amends. I can see, therefore, no ground for disturbing the present verdict.

Rule refused.

EDWARDS *against* DICK.

Saturday, April 22d.

An affidavit to hold to bail, which states that defendant is indebted to plaintiff as drawer of a bill of exchange, is not sufficient, unless it is also stated that the bill is due.

F. POLLOCK had obtained a rule to shew cause why the bail-bond given to the sheriff of *Middlesex* in this case, should not be delivered up to be cancelled, upon the defendant's filing common bail, and for staying the proceedings. The affidavit to hold to bail, stated, that the defendant was justly and truly indebted to the plaintiff in the sum of 240*l.*, as drawer of a bill of exchange, dated *December* 1st. 1819, drawn by the defendants on, and accepted by Lord *Rossmore;* the objection was, that it did not state that the bill was due.

Cross now shewed cause. The case of *Davison* v. *March* (*a*) is expressly in point; and the case of *Jackson* v. *Yate* (*b*) is distinguishable, on the ground that there the defendant was the maker of the promissory

(*a*) 1 *New R.* 157. 2 *M.* & *S.* 148.

note,

1820.

EDWARDS *against* DICK.

note, so that it might be true that he was indebted to the plaintiff, although the note might be payable at a future day. Here the defendant is the drawer of a bill of exchange, and cannot, therefore, be indebted, unless the bill be due.

Pollock, contrà, observed, that the case of *Davison* v. *March* was an extraordinary decision, and had never been recognized in this Court; and that in *Machu* v. *Fraser* (a) the authority of that case had been much broken in upon.

ABBOTT C. J. We think that it would be better to lay down a general rule which may be followed, and that the best course will be, to overrule the case of *Davison* v. *March*, and to decide that this affidavit to hold to bail is not sufficient, because it does not state the bill of exchange to have become due. The rule, therefore, must be made absolute.

Rule absolute.

(a) 7 *Taunt.* 171.

1820.

HORNCASTLE and Another *against* FARRAN.

Monday, April 24th.

Where the owner of a ship having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it: Held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods.

TROVER for goods. Plea, not guilty. At the trial before *Abbott* C. J. at the sittings after last *Michaelmas* term, it appeared that the defendant was the secretary of the *East India* Dock Company, and the plaintiffs were the owners of the ship *Kingston*. The ship had been chartered by them on a voyage to the *East Indies* and back. The freighter, Mr. *Campbell*, a merchant in *London*, bound himself by the charterparty to pay freight in the following manner: viz. 421*l.* in cash forthwith on the day of the clearance of the ship outwards; 421*l.* on that same day, by a good and approved bill at six months; a further sum not exceeding 1000*l.* for charges, &c. to be paid at her port of delivery in the *East Indies*; a further sum for payment of wages of the crew on her arrival at the port of *London*, and the remainder thereof to be paid by a good and approved bill or bills payable in *London* at three months after date from the day on which the delivery of the said homeward cargo shall be completed. The ship completed her voyage, and arrived in the port of *London*, and, according to the regulations usual in such cases, delivered her cargo, which was placed part in the *East India* Company's warehouses, and part in the *East India* Dock Company's warehouses. On the 15th *September*, 1818, a notice was given to both these bodies by the plaintiffs not to deliver the goods to *Campbell*, until they received advice that the freight had been paid. All the payments during the voyage, including the payment of the wages of the crew, were duly made. The residue of the freight due amounted to 3273*l.* 7*s.* 4*d.* On the 8th

October,

1820.

HORNCASTLE *against* FARRAN.

October, 1818, the plaintiffs received a bill at three months of 1200*l.* drawn by the captain of the ship on and accepted by *Campbell* in part payment. And on the 21st *October*, 1818, the balance was received by them in other bills. On the 24th *October*, they sent an order to *Campbell*, authorising the stop on the goods in the *East India* Company's warehouses to be taken off; but, at the same time, refused to take off that on the other goods, alleging as a reason, that they could not succeed in negociating the bill for 1200*l.* dated *October* 8th. A further correspondence took place, but the plaintiffs continued to refuse to take off the stop until *Campbell* should give them a collateral security for this bill. Notwithstanding this refusal, the *East India* Dock Company, upon an indemnity being given to them, permitted *Campbell's* agent to remove the goods. It appeared that all the bills, including that for 1200*l.*, had been negociated by the plaintiffs. The Lord Chief Justice, at the trial, held, that this circumstance put an end to the plaintiffs' lien on the goods, and directed a nonsuit. *Scarlett*, in last *Hilary* term, having obtained a rule nisi to set this nonsuit aside, and for a new trial,

Marryat (and *Gurney* was with him) shewed cause. The negotiation of the bills was a relinquishment of the lien of the plaintiffs, supposing one even to have existed, because, otherwise, the plaintiffs would make *Campbell* liable to pay the bills to the holders, without giving him the power, by the sale of the goods, to provide for the payment. And there was no special agreement; for *Campbell* did not, as it appears, even know that the bills had been negotiated. But, secondly, there was no lien at all in this case. The clause in the *East India* Dock Company's

1820.

HORNCASTLE *against* FARRAN.

pany's act states, 54 *G.* 3. *c.* 228. *s.* 18. "That all such wares and merchandizes landed and warehoused under the provisions of this act, shall, when so landed and warehoused, continue subject 'or liable to such and the same claim for freight as such goods, &c. respectively were subject or liable to whilst the same were on board such ships, and before the landing thereof." Here, however, by the charterparty, the plaintiffs had no right to require any bills to be given till after the complete delivery of the homeward cargo. Then, if so, they never had a lien on the goods whilst on board the ship. And, if so, the act gives them none whilst in the warehouse of the *East India* Dock Company. And he cited *Saville* v. *Campion.* (*a*)

Scarlett and *Chitty*, contrà. The acts are to be concurrent, and the plain meaning of the charterparty is, that the goods shall be delivered on the giving of good and approved bills; and so it was ruled in the case of *Tate* v. *Meek*, *Easter* term 1818, in the Common Pleas, upon a charterparty similar to the present. There was, therefore, a lien originally on the goods. Then the only material question is, has that lien been relinquished? That depends on this, whether this bill for 1200*l.* can be considered as a good and approved bill. On the 24th *October* the plaintiffs distinctly objected to it, and on that express ground refused to give up their lien. Then, can the subsequent negotiation make any difference? If the bill is not to be negotiated, neither party gains any advantage. The bill is given for the purpose of negotiation; and if negotiated after having

(*a*) 2 *B.* & *A.* 503.

been

1820.

HORNCASTLE *against* FARRAN.

been objected to, it is still not an approved bill. Until an approved bill be given, the lien continues. In the case of stoppage in transitu, that right is not lost by the acceptance and negotiation of a bill for the amount due.

ABBOTT C. J. In the present case, it appeared that *Campbell* had a right to the delivery of the goods, upon his giving good and approved bills for the freight to the owners of the ship. Now, in order to obtain possession, he does deliver to them the bill in question; and, upon their expressing their disapprobation of it, he accedes to it, and at first acquiesces in their retaining possession of the goods. That, however, was done in ignorance of the fact of their having at that time negotiated the bill. I thought, at the trial, that the negotiation of the bill was to be taken as against the party negotiating it, as an approbation of the bill by him; and that the owners of the ship having, by this act, declared their approbation of the bill in question, had lost their lien on the goods. I am still of the same opinion, and I think, therefore, the nonsuit was right, and that this rule ought to be discharged.

BAYLEY J. I am also of opinion, that the nonsuit in this case was right. It appears that *Campbell* having given the bill in question, the owners of the ship expressed their disapprobation of it. In consequence of this, the stop which had been placed upon the goods in the *East India* Company's warehouse continued, and it became necessary for *Campbell*, if he wished to get it removed, to give another bill. Under these circumstances, however, the owners chose to negotiate the original bill. Now, if *Campbell* had consented expressly

to

1820.

HORNCASTLE *against* FARRAN.

to this negotiation, and yet had agreed that the plaintiffs should retain their lien on the goods, he would, of course, have been bound by that agreement; but that was not the case; and if the plaintiffs negotiated the bill without such express consent on his part, it seems to me, that they gave up their lien on the goods. If we were to hold otherwise, the consequence would be this, that *Campbell* would be prevented from obtaining his goods, in order to enable him to take up the bill, and vet he might be arrested on it, and compelled to pay it. That would be a great inconvenience and hardship, and one which ought not to be imposed upon him without his express consent. I think, therefore, that as soon as this bill was negotiated by the Plaintiffs, their lien on the goods was given up. The nonsuit, therefore, was right.

HOLROYD J. I am of the same opinion. The plaintiffs, in this case, acted on the bill as their own, by their first accepting, and afterwards negotiating it. They ought, if they disapproved it, to have given it back to *Campbell*. As to their having objected to it, I do not place much reliance upon that; for, though they objected to it in words, they approved it by their act; for, by negotiating it, they put it out of their power, afterwards, to return it to *Campbell*. I am, therefore, of opinion, that they had no further lien upon the goods, and that the nonsuit was right.

BEST J. concurred.

Rule discharged.

1820.

Tuesday, April 25th.

PIGGOTT *against* WILKES.

The sheriff having, within a liberty where particular officers had the exclusive privilege of executing all process, arrested a defendant upon a ca. sa. in which there was not any non-omittas clause, suffered him to go at large before his removal from the liberty: Held, that he was liable in an action for an escape.

DECLARATION in debt against the sheriff of *Essex* for an escape. Plea, nil debet. At the trial, before *Garrow* Baron, at the last Spring assizes for the county of *Essex*, it appeared, that the sheriff had taken the party in execution, within the borough of *Malden*, upon a ca. sa., in which there was not any non omittas clause. In that place, by charter, the mayor, &c. of the borough claimed the exclusive privilege of executing all process; and the defendant, in the original action, escaped before he had been removed from *Malden*. Upon these facts, it was contended at the trial, that as the sheriff had no right to arrest the party within a privileged place, the arrest was bad, and consequently, that there could be no action for an escape. The learned Judge reserved the point, and the jury found a verdict for the plaintiff.

Walford now moved to enter a nonsuit. The sheriff was not authorized to arrest the party within the borough of *Malden*. The arrest itself, therefore, was unlawful, and he thereby subjected himself to an action, at the suit of the defendant in the original action, as well as of the mayor of the liberty. The sheriff, at all events, cannot be liable for suffering a party to escape, whom he ought never to have taken into custody, and who actually escaped before he had been removed from the privileged place.

ABBOTT C. J. The arrest was not wrongful, as against the defendant in the original action, although it was

1820.

PIGGOTT *against* WILKES.

was wrongful as against the bailiff of the liberty: and although the sheriff might have thereby subjected himself to an action at the suit of the latter. In cases of arrests by the sheriff within the verge of the palace, he is in contempt unless he has the leave of the Board of Green Cloth; the arrest, however, is not therefore void. (*a*) I am of opinion, that in this case, the sheriff having once taken the party, was bound to keep him in custody, and that consequently he is liable in this action.

Rule refused.

(*a*) Vide *Fitzpatrick* v. *Kelly*, *M.* 22. *G.* 3. *B. R.* cited in argument in *Rex* v. *Stobbs*, 3 *Term. Rep.* 740.

WRIGHT *against* CLEMENTS.

Tuesday, April 25th.

Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, *in substance* as follows; and then set out the libel with innuendoes: Held, that this was bad in arrest of judgment.

DECLARATION stated, that defendant contriving, &c. falsely, &c. did publish, and did cause and procure to be published, a certain false, scandalous, malicious, and defamatory libel, in the form of a statement, purporting to be written by one *William Cobbett*, of and concerning the plaintiff, containing, amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the said plaintiff, *in substance*, as follows; that is to say: it then proceeded to set out the libel with innuendoes. The plaintiff having obtained a verdict for 500*l.* damages, at the *Middlesex* sittings after last *Michaelmas* term, before *Abbott* C. J., a rule was obtained in *Hilary* term for arresting the judgment, on the ground that the declaration was defective in stating

the

1820.

WRIGHT *against* CLEMENTS.

the libel to be set out in substance only, and not according to the tenor. And now

Scarlett, *Denman*, and *Chitty*, shewed cause. This rule was obtained on the authority of the case of *Newton* v. *Stubbs*. (*a*) There the declaration stated the words spoken to be to the effect following, and that was held to be bad in arrest of judgment. That case, however, does not apply to the present; for taking the whole declaration together, it appears that the very words of the libel are set out, for there are innuendoes which would be unnecessary, if the declaration purported to set out only the substance or effect. It is sufficient, at all events, after verdict, if the declaration imports to set out the substantial matter of the libel. In the *Queen* v. *Drake* (*b*), *Holt* C. J. says, "a libel may be described either by the sense or by the words, and therefore an information charging that the defendant made a writing containing such words, is good, and in such a case a nice exactness is not required because it is only a description of the sense and substance of the libel." That is an authority to shew that it is sufficient to set out the substance of the libel. In *The King* v. *Bear* (*c*), the declaration purported to set out the libel according to the tenor and effect following, and it was held that although the words to the effect following, of themselves might be bad, yet that coupled with the word tenor, which imported a literal copy, they might be rejected. It is not, however, necessary to set out the literal copy of a libel, for the variance of a letter not altering the sense is immaterial, and that shews that it is sufficient

(*a*) 2 *Show.* 435. 3 *Mod.* 71. (*b*) 3 *Salk.* 225.
(*c*) 2 *Salk.* 417. 1 *Ld. Raym.* 414, *S. C.*

to

1820.

WRIGHT *against* CLEMENTS.

to set out the substance of the libel. Admitting it, however, to be necessary to give in evidence the precise words of the libel, it is sufficient, after verdict, that it should be so stated on the record that there is no positive repugnancy between the mode of stating it, and the necessity of proving the precise words. Now there is nothing in the words "in substance as follows," which dispenses with the necessity of proof of the very words of the libel; for the innuendoes shew that the plaintiff undertakes to prove the precise words. In the course of the argument, they cited *Wood* v. *Brown* (*a*), and *Rex* v. *Leefe*. (*b*)

Platt, contrà. The words "in substance as follows," form a material part of the description of the libel, and cannot, therefore, be rejected. In actions for oral or written slander, it is not sufficient to set out the substance, but the very words must be stated upon the record, in order that the Court may judge whether they be actionable or not; if it were sufficient to set out the substance, the verdict of the jury would be conclusive upon that point, and the party would be deprived of his writ of error. In *Zenobio* v. *Axtell* (*c*), it was held to be insufficient, in an action for a libel written in a foreign language, to set out the translation, which, if correct, however, would have contained the substance of the libel. *Cook* v. *Cox* (*d*) is precisely in point. The declaration there stated that the defendant accused the plaintiff of being in insolvent circumstances, without setting out the words, and the Court, upon argument,

(*a*) 1 *Marsh.* 522. 6 *Taunt.* 169. (*b*) 2 *Campb.* 138.
(*c*) 6 *T. R.* 162. (*d*) 3 *M. & S.* 110.

1820.

WRIGHT *against* CLEMENTS.

held it to be bad, after verdict, upon principle and authority. This declaration cannot be supported.

ABBOTT C. J. I am of opinion, that in this case the objection must prevail, and that the judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this, is to state, that defendant published, of and concerning the plaintiff, the libellous matters, to the tenor and effect following. In that case the word "tenor" governs the word "effect," and binds the party to set out the very words of the libel. There is another mode of doing it, by stating that defendant published the libellous matters following; that is to say. And in this case, also, it is understood, that the very libel is set out. Here, however, more words have been introduced into the declaration, and the question is, whether the additional words have not varied the sense. The allegation here, which has departed from the common form of the precedents, is, that the defendant published certain libellous matter, in substance as follows. Now the question is, whether the words "in substance," do not give a different meaning to the passage which follows. It seems to me that they do; for we are to understand these words in their ordinary sense. Suppose a person were to say, I have read a book concerning certain interesting historical questions, in which is contained a passage, in substance as follows; no man would understand him to be about to repeat the very words of the passage, but only that he was about to give an abstract of

1820.

WRIGHT *against* CLEMENTS.

of it. So it is that I understand this declaration. It is true, that in pleading, many words have obtained an appropriate and technical sense, different from their popular meaning; and if that had been the case with the words "in substance," it might have varied the present question: but it is not so, and those words must, therefore, be understood in their ordinary sense. I think, therefore, that the plaintiff in his declaration, not having professed to set forth the very words of the libel, but only their substance and effect, and, as it were, a sort of abstract of them, the judgment must be arrested. It is of great importance to follow the ancient form of precedents; for if we depart from them in one instance, one deviation will naturally lead to another, and, by degrees, we shall lose that certainty which it is the great object of our system of law to preserve.

BAYLEY J. I am of the same opinion. A defendant, in a case like this, has a right to expect that the plaintiff, in his declaration, will set out the very words used, or so much of them as he means to rely upon; and the usual mode of doing this has been already stated by my Lord Chief Justice. The word "tenor" has, in law, a peculiar and technical sense, and the distinction between it and "substance" is distinctly pointed out by *Buller* J., in *Rex* v. *May* (*a*), where he says, that "the word tenor has so strict and technical a meaning, as to make it necessary to recite verbatim; but that by the expression, "manner, and form following," used in that case, nothing more than a substantial recital was requisite." Here it is stated, that defendant published

(*a*) *Dougl.* 193.

1820.

WRIGHT *against* CLEMENTS.

certain false and libellous matters, in substance as follows; the latter words, therefore, qualify those which precede, and would let the party in at nisi prius to looser proof than would have been required in case the declaration had stated the libel verbatim. Then, if the law requires the libel itself to be stated, how can a declaration be sufficient which states the libel in substance only. For two statements, which may differ in words, may agree in substance. Besides, if it be sufficient to set out a libel in substance, who is to decide whether it is proved, the Judge or the jury? And if they differ, the defendant might be deprived of the judgment of the Court out of which the record comes. I think, therefore, that if we were to hold this declaration sufficient, we should relax the strictness of proof at present required, and depart from the unvaried course of all the precedents. The judgment, therefore, must be arrested.

HOLROYD J. I am of the same opinion. The old form of declaring was, to state the libel "according to the tenor and effect following," or, "according to the tenor following." And the law attaches a technical meaning to the word "tenor," as signifying either an exact copy or a statement of the libel verbatim. If the usual mode be not followed, but new words substituted for these expressions, the Court must understand those new words according to their popular and ordinary sense. And considering this case in that way, the words "in substance," mean not a literal copy of the libel, but only the general import and effect of it. Now where a charge, either civil or criminal, is brought against a Defendant, arising out of the publication of

a writ-

1820.

WRIGHT *against* CLEMENTS.

a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment; and the reason of that is, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the Court, whether the facts stated amount to a cause of action, or a crime. For it is clear that when it can be shewn distinctly what the instrument is upon which the whole charge depends, that instrument must be shewn to the Court, in order that they may form their judgment. A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to put it as a mere question of law to the Court. This mode of declaring would not only deprive him of that advantage, but also of his writ of error; and it would make the verdict of a jury binding in cases where it ought not to be so. For if the jury find the verdict that the libel proved was in substance the same as the charge in the declaration, contrary to the opinion of the Judge, that would be binding upon the parties, and the defendant could bring no writ of error, even although the whole might be a question of law. I think, therefore, that this declaration is bad, and that the judgment must be arrested.

Rule absolute. (*a*)

(*a*) *Best* J. was absent at the *Old Bailey*.

1820.

Wednesday, April 26th.

The KING *against* Sir FRANCIS WILLES, Knt.

A copyhold of inheritance is not forfeited by a conviction of felony without attainder, unless there be a special custom in the manor.

IN *Trinity* term last, this Court, on the application of *Samuel Wells*, granted a rule, calling on the defendant as lord of the manor of *Biggleswade*, in the county of *Bedford*, to shew cause why a writ of mandamus should not issue directed to him, commanding him to admit the said *Samuel Wells* to certain copyhold tenements, parcel of the said manor, on the surrender of *William Studman*, late tenant thereof. On shewing cause, the Court enlarged the rule, until *Michaelmas* term last, with liberty for the parties to state a special case, which was as follows: *William Studman*, on the 15th of *October*, 1818, when he committed the offence of which he was convicted as hereinafter mentioned, was seised in fee at the will of the lord, according to the custom of the manor, of certain copyhold messuages and tenements, customary tenements of the manor of *Biggleswade*, in the county of *Bedford*. After the said *William Studman* had committed such offence, viz. on the 28th *October*, 1818, the above-named *Samuel Wells* bonâ fide contracted and agreed with the said *William Studman* to purchase from him the said premises for the sum of 700*l*., and on the 2d of *November* following, the premises were duly surrendered by the said *William Studman* to the lord of the said manor, to the use and behoof of the said *Samuel Wells*, his heirs and assigns. At the General Quarter Sessions of the peace for the county of *Hertford*, held on the 19th of *October*, 1818, one *Thomas Halworth* was convicted for feloniously steal-

stealing, on the 16th of *October*, in the same year, two bushels of fine pollard of the value of 16*s*., and two bushels of coarse pollard, of the value of 5*s*.; and afterwards, at the General Quarter Sessions for the county of *Bedford*, held on the 13th day of *January*, 1819, the said *William Studman* was indicted for feloniously receiving, on the said 15th day of *October*, 1818, the said two bushels of fine pollard, and the said two bushels of coarse pollard, knowing the same to have been feloniously stolen, upon which indictment the said *William Studman* was convicted. Whereupon judgment was given against him, that he should be transported for the term of fourteen years, to such parts beyond the seas as his Majesty, by and with the advice of his privy council, should think proper to order. The record of *William Studman*'s conviction did not state that he prayed the benefit of the statute; and on reference to the clerk of the peace, it appeared that the prisoner did not perform that ceremony. No prosecution or proceedings were depending against the said *William Studman*, at the time when he surrendered the said tenements and premises as aforesaid. The manor of *Biggleswade* formerly belonged to the crown, until it was purchased by the present Lord Sir *Francis Willes*, knt., under the 42 G. 3. c. 116. It did not appear by the court rolls of the said manor, or otherwise, that any case at all similar to the present ever before occurred within the said manor, nor was there any special custom within the said manor respecting forfeitures for felony or crime. The question for the opinion of the Court was, whether the said *Samuel Wells* was entitled to the said estates, and to be admitted thereto; or, whether the same were forfeited by the commission of the said offence to the lord of the manor.

If

1820.

The King *against* Willes.

If the Court were of opinion, that the said *Samuel Wells* was entitled to the said estates, then a mandamus was to be issued commanding the lord of the said manor to admit the said *Samuel Wells* to the same.

Chitty, in support of the rule, contended that in the present case there was not a sufficient ground of forforfeiture: for unless there be judgment of attainder there is no forfeiture. In *Jory* v. *Pawly* (*a*), this very question was considered. There a copyholder of inheritance was convicted of felony, and had his clergy allowed before attainder; and the Court were strongly inclined to hold, that without a special custom it was no forfeiture. It does not appear that that case, which on the importunity of counsel was ordered to be argued again, ever came on a second time, which probably was because the opinion expressed by the Court was acquiesced in afterwards. And the same opinion is also expressed in the first point in Lord *Cornwallis*'s case (*b*), where it is said that the Court seemed to be of opinion, that no seizure could be till attainder without special custom. In *Com. Dig.* tit. *Copyhold, M.* 1. this is laid down as clear law. In *Hawkins Pl. Cor. lib.* 2. *c.* 49. *s.* 7. it is said that "by force of a special custom, a copyhold of inheritance may be forfeited by an attainder, or conviction, of treason, or felony, and by custom, even without a conviction. Also, it seems the stronger opinion, that it shall be forfeited by an attainder of treason or felony, of common right, without any special custom, but not by a conviction only;" and in support of

(*a*) 1 *Lev.* 263. (*b*) 2 *Ventr.* 38.

this

1820.

The KING *against* WILLES.

this doctrine, in addition to other cases, he cites 2 *Keb.* 451. In *Watkins on Copyholds*, p. 325, the reason given for it is, because the copyholder, by an attainder of treason or felony, loses his capacity to enjoy land Now, in the present case, it appears that *Studman* was convicted under 5 *Ann. c.* 21. of receiving stolen goods. By 3 and 4 *W. & M. c.* 9. such offenders were made accessaries after the fact; and by 5 *Ann. c.* 21. *s.* 5. it was enacted that they should suffer death as a felon convict; and by 4 *G.* 1. *c.* 11. *s.* 1. they may be transported for fourteen years. Now, the benefit of clergy not being taken away, the judgment of death, without which there can be no forfeiture, was not passed. The effect of benefit of clergy is stated by Lord *Hale* to be this, that presently upon the burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof, 2 *Hale P. C.* 389.; and 4 *Black.* p. 373. is to the same effect. If, then, by the allowance of clergy, he is restored to his capacity of holding land, the reason for the forfeiture fails. It is true, that it is not stated in the case that the ceremony of praying the benefit of clergy was performed: but that is not necessary; for it is laid down in 2 *East P. C.* 744. that in grand larceny, the party must pray the benefit of the statute; and the same doctrine is to be found in *Rex* v. *Johnson* (*a*), and in *Hamlen* v. *Hamlen.* (*b*) Besides, it is for the other side to show affirmatively that sentence of death was passed, in order to establish the forfeiture; for a forfeiture being odious, proof must be given in order to establish it. *Doe on dem. Tarrant* v. *Hellier.* (*c*)

(*a*) 3 *M.& S.* 549. (*b*) 1 *Buls.* 190. (*c*) 3 *T. R.* 162.

Puller,

1820.

The King *against* Willes.

Puller, contrà. All the authorities upon this subject have been cited, and there is none in which the point has been decided; for *Jory* v. *Pawly* was never adjudged, nor was any decided opinion pronounced in Lord *Cornwallis*'s case. That being so, the Court are to determine whether upon principle such a decision ought to be made. Here a conviction has taken place, and it is not stated that clergy was allowed.

Abbott C. J. The rule for a mandamus must be made absolute. The authority of Lord *Hale* is strong upon the subject. There can be no forfeiture of freehold without attainder, and so it was held in *Steven*'s case. (*a*) Then, if so, how can there be a forfeiture of copyhold before attainder, without a special custom? There is no such custom stated in this case; and therefore there was no forfeiture, and the party is entitled to be admitted.

Rule absolute for a mandamus.

(*a*) *Cro. Car.* 566.

Wednesday, April 26th.

Brandon *against* Henry.

Practice.

CAMPBELL had obtained a rule nisi for setting aside the judgment of non pros., signed in this case, for irregularity. The defendant having been arrested on a bill of *Middlesex*, on 22d of *November*, special

1820.

BRANDON *against* HENRY.

special bail were put in in *Michaelmas* term, and were perfected in *Hilary* term. Judgment of non pros. was signed in *Hilary* vacation.

Tindal shewed cause, and contended, that bail added to other bail, taken on or before the continuance-day, were to be considered as bail of the preceding term. And he referred to *Tidd's Practice*, 270. 6th edit. In this case, therefore, the plaintiff ought to have declared in *Hilary* term, and the judgment of non pros. was regular.

Campbell, contrà, was stopped by the Court.

Per Curiam. The true construction of the statute 13 *Car.* 2. *st.* 2. *c.* 2. *s.* 3. would be, that even if the bail were entered as of the preceding term, the defendant would not, in such a case as this, be entitled to judgment of non pros. But, in fact, the practice is otherwise. For although bail added and justified in vacation are entitled as of the preceding term, yet bail acknowledged and justified in a subsequent term are not entered as of the preceding term, even where substituted for other bail put in of the preceding term. Here the plaintiff was guilty of no laches, in not declaring in *Michaelmas* term, as the defendant was not then fully in court.

Rule absolute. (*a*)

(*a*) Vide *Rolleston* v. *Scott*, 5 *T. R.* 372.

1820.

Friday, April 28th.

STUBBS *against* PARSONS.

A plea in bar in replevin stated, that divers sums of money amounting to a certain sum, had been, from time to time, duly assessed and rated upon the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which defendant, as landlord, was liable to bear in respect of the rent: Held, that this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued, or was accruing.

IN replevin for taking the plaintiff's goods in his dwelling-house, the defendant made cognizance as bailiff, of *J. Wood*, and *Richard V. Duny*, under a demise at 220*l.* rent payable quarterly, for 55*l.* for a quarter's rent due 25th *March* 1819. The plaintiff pleaded, as to the sum of 52*l.* 14*s.* 3*d.*, parcel of the said rent, that before the 25th *March*, and before the said time when, &c., divers sums of money, amounting in the whole to 52*l.* 14*s.* 3*d.*, had been, from time to time, duly assessed and rated upon the said dwelling-house for the land-tax due in respect of the said dwelling-house by virtue of the statute in such case made and provided; and that, from time to time, he, the plaintiff, as tenant and occupier of the dwelling-house, in pursuance of the statute in such case made and provided, was called upon and forced to pay the said sum of 52*l.* 14*s.* 3*d.* so due for land-tax, wherefore he did, according to the form of the said statute, abate, deduct, and keep in his own hands the said sum of 52*l.* 14*s.* 3*d.* out of the said rent, that being the amount of the tax which the said *J. Wood* and *Richard V. Duny*, as landlords of the said dwelling-house, were liable to bear in respect of the rent; the plaintiff then pleaded, as to the residue, a tender. The defendant demurred generally to the first plea, and took issue on the second, and the case was now argued by

Chitty, in support of the demurrer. The plea in bar is bad; because it does not contain a statement that the

the land-tax became due after the accruing of the rent out of which it is sought to be deducted, nor even during the continuance of the tenancy. The case of *Andrew* v. *Hancock* (a) is precisely in point. In replevin no set-off can be allowed; and this deduction can only be available by the express provisions of the act of parliament.

1820.

STUBBS *against* PARSONS.

Marryat, contrà. This case is materially distinguishable from *Andrew* v. *Hancock*: here it does not appear at what time the payment was made. It is true that a set-off in a distinct right cannot be pleaded; but here it is in substance a plea of payment as to part, and tender as to the residue. *Sapsford* v. *Fletcher* (b), and *Taylor* v. *Zamira* (c), are authorities in point. It is alleged that the sum stated in the plea was the amount which the landlord was bound to pay, in respect of the rent reserved. It is said, indeed, that this may have been land-tax, which may have accrued before the tenancy began, and there is no objection to that; for an occupier, who comes in after the premises have been vacant for some time, is liable to the arrears of the land-tax. In *Denby* v. *Moore* (d), which was a case of property-tax, the act required that the tax should be deducted out of the next rent. But in the land-tax act (e), it is only stated that the tenants are required and authorised to pay such sums of money as shall be rated upon such houses, &c. and to deduct out of the rent so much of the said rate as in respect of the said rents of any such houses, &c. the landlord should and ought to pay and bear.

(a) 1 *Brod. & Bing.* 37.
(b) 4 *T.R.* 511.
(c) 6 *Taunt.* 524.
(d) 1 *B. & A.* 123.
(e) 38 *G.* 3. *c.* 5. *s.* 17.

bear. There is, therefore, nothing in this clause which directs the tax to be deducted out of the next rent, or indeed at any particular period during the tenancy.

BAYLEY J. This is a replevin, in which the defendant makes cognizance for the sum of 55*l.*, being a quarter's rent due 25th *March*, 1819; and the plaintiff, by his plea, claims to deduct 52*l.* 14*s.* 3*d.* in respect of payments made by him for land-tax, duly assessed and rated, and due for and in respect of the premises. The plea does not, however, state at what period of time the land-tax claimed to be deducted was assessed or paid; and it is quite consistent with the plea that this may have been a payment for land-tax due at an antecedent period, made long before any part of the rent distrained for became due or was accruing, or even before the commencement of the present landlord's title; for the plea only states, that before the time when, &c. divers sums, amounting to the sum in question, had been duly assessed and rated upon the premises for the land-tax due in respect of them; and that from time to time, before the 25th *March*, and before the said time when, &c. the plaintiff, as tenant and occupier of the premises, was obliged to pay, and did pay, the said sum so due and owing for land-tax, whereupon he did deduct it out of the rent; so that it does not even state that the land-tax in question became due during the continuance of the plaintiff's tenancy. Now, in order to support this plea, the plaintiff must bring himself within the meaning of the 38 *G.* 3. *c.* 5. *s.* 17. I lay *Denby* v. *Moore* out of the question, that decision having been founded on the words in the property-tax acts, which require the deduction to be made out of the next rent upon a differ-

different principle, viz. with a view to prevent frauds upon the revenue. The cases of *Sapsford* v. *Fletcher*, and *Taylor* v. *Zamira*, are also distinguishable; for there the payment was made after the rent, from which it was sought to be deducted, had accrued or was accruing. The principle of those cases is this, that the payment there of the ground-rent to the ground-landlord, was paying a part of the very rent due to the landlord, and, in fact, a payment of so much money to the landlord himself. This case, however, goes much further; for the claim here is to deduct money paid at a period before the rent distrained for began to grow due. The words of the statute are, "That the several and respective tenants are required to pay such sum or sums of money as shall be rated upon such houses, &c. and to deduct out of the rent so much of the rate as in respect of the said rents of any such houses, &c. the landlord should and ought to bear; and the landlords are required to allow such deduction out of the rent." Now, one plain objection to this plea is, that it does not state that the sum claimed to be deducted is that proportion of the sum paid which, in respect of the rent reserved, the landlord ought to bear; for it is not stated that the amount, at which the premises are rated for the land-tax, is the same as the rent reserved. Suppose the premises are rated to the land-tax at 100*l.* upon which the land-tax would be 20*l.*; if the premises are let for 100*l.* then the tenant would have a right to deduct the whole land-tax, or 5*l.* quarterly; but if the rent reserved were more or less than that sum, then the quarterly deduction would not remain the same, but would vary in a proportionate degree. The true construction, however, of this clause, upon which my

1820.

STUBBS *against* PARSONS.

judgment proceeds, is, that a payment to the land-tax can only be deducted out of the rent which has then accrued, or is then accruing due; for the law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord; and if afterwards he pays the rent in full, he cannot at a subsequent time deduct that overpayment from the rent: he may, indeed, recover it back as money paid to the landlord's use. For these reasons, it seems to me that the plea is bad, and that there must be judgment for the defendant.

HOLROYD J. I am of opinion that this plea in bar is bad, not being a sufficient answer to the defendant's cognizance. It states that divers sums had been duly assessed upon the premises for the land-tax; but it does not state either what those sums were, or for or in respect of what period of time they were assessed, so as to enable the opposite party to come prepared with evidence, in case he had an answer in point of fact to the plea. Upon this ground, therefore, I think the plea is bad. With respect to the other point, it appears to me, if a party were allowed to deduct a payment for land-tax made previously, this inconvenience would follow, that if a lessor assigned over his interest, the assignee might be made liable to this deduction, which the tenant had neglected previously to make, and, for any thing that appears in this plea, that may be the case here; for, consistently with the facts there stated, the present defendant may not be the person from whom this land-tax ought in justice to be deducted. The occupier has, as it seems to me, a lien on the next rent given him by the legislature for the land-tax paid by him;

1820.

STUBBS *against* PARSONS.

him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off, and the latter is not allowed in replevin. The plea, therefore, is bad, and our judgment must be for the defendant.

Judgment for defendant. (a)

(a) *Abbott* C. J. and *Best* J. were at the *Old Bailey* during the argument in this case.

TAYLOR *against* YOUNG. In Error.

Friday, April 28th.

One of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants: both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy: Held, that the lessee could not prove, in respect of the penalty under the commission, the bond being incapable of valuation: Held, also, that he could not prove for the damages which had accrued previous to the bankruptcy, not having paid them to the lessor: Held, also, that the 49 *G.* 3. *c.* 121. *s.* 19. applies only to cases between the lessor and lessee, or assignee of the lease, and not to cases between the lessee and the assignee of the lease.

DEBT on bond. The condition of the bond, after reciting a demise, dated 30th *September*, 1814, of certain premises by *Christopher Wilson* to *Young* for the term of 15 years, at a yearly rent of 200*l.*, and subject to certain covenants, &c.; and that *Taylor* and one *George Jarman* had contracted with *Young* for the purchase of the residue of the term so demised, and that *Young* had accordingly, on the 29th *September*, 1815, (being the date of the bond) assigned over his interest to *Taylor* and *Jarman*, was as follows: "That if the said *George Taylor* and *George Jarman*, or either of them, their or either of their heirs, executors, administrators, or assigns, did and should from time

1820.

Taylor *against* Young.

to time and at all times thereafter, during the residue then to come and unexpired of the said term of fifteen years wanting seven days, by the said indenture of lease granted, well and truly pay or cause to be paid the rent, and observe, perform, fulfil, and keep the covenants, provisoes, and agreements reserved, expressed, and contained by and in the said indenture of lease, and which, on the tenants' and lessees' part, were and ought from thenceforth to be paid, observed, performed, fulfilled, and kept; and also did and should well and sufficiently save, defend, keep harmless and indemnified, the said *W. G. A. Young*, his heirs, executors, and administrators, and every of them, of, from, and against all and all manner of action and actions, suit and suits, costs, charges, damages, and expences whatsoever, which should or might be brought against him or them, or which he or they should or might sustain, expend, or be put unto for or on account or by reason or means of the non-payment of the said rent, or the breach, non-observance, or non-performance of the said covenants, provisoes, and agreements, or any of them; then the said obligation was to be void and of no effect." The declaration then stated the following breaches: first, That *Taylor* and *Jarman*, on 21st *October*, 1817, suffered and permitted 210*l.* of the rent to remain due and unpaid to the said *Christopher Wilson*, and wholly neglected and refused to pay the same, or any part thereof; secondly, That they did not well and sufficiently indemnify *Young* against all actions, &c., but that, on the contrary thereof, on the 21st *October*, 1817, they suffered a certain action to be brought against him by *Wilson* for the recovery of the rent in arrear, and did not, although requested, pay him the

costs

1820.

TAYLOR *against* YOUNG.

costs and charges incurred by him by reason of the said action so brought against him by *Wilson*. The defendant, *Taylor*, pleaded, first, a general plea of bankruptcy; and, secondly, that under 49 *G.* 3. *c.* 121. *s.* 19. there being a joint commission of bankruptcy against him and *Jarman*, their assignees had accepted the lease, and the benefit therefrom, as part of their estate and effects under the bankruptcy; and that before any rent became in arrear, and before the said action was brought, they had assigned the lease, &c. to one *John Dyson*, who entered, &c., by means of which *Taylor* ceased to be liable to be in any manner sued in respect or by reason of any non-observance or non-performance of the conditions, covenants, or agreements contained in the said lease. To these pleas there was a general demurrer, and joinder in demurrer. Upon the argument, the Court of Common Pleas gave judgment for the plaintiff. Whereupon the defendant brought a writ of error.

Campbell, for plaintiff in error. The first question is, whether these breaches could have been proved under the commission. If they could, then the certificate will be a bar. Here, it is to be observed, that the bond was forfeited before the bankruptcy, and in that case the damages arising therefrom, whether they be liquidated or unliquidated, may be proved under the commission. For the penalty is the debt, and out of it the commissioners are to carve the damages which the party has sustained. It is not necessary to contend that by this the bond is absolutely gone. For, suppose no bankruptcy to have taken place, if an action had been brought on the bond, and a breach assigned, yet that

1820.

TAYLOR *against* YOUNG.

would not prevent the assignment of fresh breaches, if any should subsequently occur. In *Flanagan* v. *Watkins* (a) it was held that the certificate was a bar to all the breaches which in that case occurred before the commission. Here the damages are liquidated, and the plaintiff might have proved them under the commission. [*Bayley* J. He could not have proved for money paid, but only for a liability to pay.] In *Ex parte Leitch* (b) where there was a bond conditioned to replace stock, and the bond had been forfeited, it was held that the obligee might prove. So also, in *Ex parte Day*. (c) But in *Ex parte King* (d), the proof was not admitted, because the bond had not been forfeited previously to the bankruptcy. And, again, the same decision was made in *Ex parte Mare* (e), and for the same reason. So, also, in the cases of annuities previously to the passing 49 *G.* 3. *c.* 121., where there was a bond for the payment of the annuity, and it had been forfeited, the value might have been proved, *Ex parte Belton* (f); and the object of the statute was to put cases, where there was no bond, on the same footing. The same rule prevails as to cases of bail-bonds, *Bouteflour* v. *Coates* (g). And *Toussaint* v. *Martinnant* (h), *Ex parte Cookshott* (i), *Hodgson* v. *Bell* (k), are also authorities in favour of this view of the case. As to the case of *Goddard* v. *Vanderheyden* (l), which will be cited on the other side, it is sufficient to say, that

(a) 3 *B.* & *A.* 190.
(b) *Cooke B.L.* 149.
(c) 7 *Ves.* 301.
(d) 8 *Ves.* 334.
(e) 8 *Ves.* 335.
(f) 1 *Atk.* 251.
(g) *Cowp.* 25.
(h) 2 *T.R.* 100.
(i) *Cooke B.L.* 149.
(k) 7 *T. R.* 97.
(l) 3 *Wils.* 270.

the

the part relied on was only a dictum of the Court, and not necessary to the determination of that case. [*Abbott* C. J. There are cases which shew, that where there is a bond with a penalty, and a value can be put on it by computation, the proof may be allowed; and so the bond may be for ever discharged. But, is there any case which shews that even where there is a penalty, and the nature of the bond is such that its value cannot be ascertained, the party has ever been allowed to prove under the commission. *Holroyd* J. The proof under the commission is in respect of the penalty for the whole value of the bond, and there the certificate operates as a discharge of the whole penalty, which is the legal debt. *Bayley* J. How can you calculate the value of a covenant to perform covenants? Is there any case in which a bond like this has been treated as a divisible bond, so as to allow proof to be made under the commission for the damages occurring before the bankruptcy, and leaving the bond still in force as to the residue?] A value might have been easily put upon the breaches of the condition of the bond assigned in this declaration; and, therefore, as to these, the certificate should be a bar, although a value could not be put upon the indemnity, and for any damnification subsequent to the bankruptcy, the bond may be in force. If the certificate is no bar to breaches of the condition of the bond before the bankruptcy, unless the whole of the condition can be valued, this extreme hardship will follow, that if a bond be conditioned to pay 10,000*l.* on a given day, and to do some collateral act at a future time, and the obligor becomes bankrupt after the day when the money was to be paid, notwithstanding his certificate, he may be sued for the 10,000*l.* But the

diffi-

1820.

Taylor *against* Young.

difficulty may be obviated by considering the parties in the same situation as if the sum for which the proof is made had been paid by the obligor without his having become bankrupt. On the second point; This case falls within 49 *G.* 3. *c.* 121. *s.* 19. Here the assignees of *Taylor* and *Jarman* have accepted the lease; and, therefore, the bankrupt remained no longer liable to pay the rent: if so, there is no breach of the condition of the bond. Either the plaintiff in error is sued in respect or by reason of the subsequent non-observance or non-performance of the covenants, &c. in the lease, or he is not; if he is, he is protected by the statute; if he is not, then there is no breach of the condition of the bond.

Deacon, contrà, was desired by the Court to confine himself to the second point. He contended that the clause in question related only to contracts between the lessor and lessee, and that it did not apply to a case like this, in which the question was between a lessee and an assignee of the lease. Though the words at the beginning of the clause are undoubtedly very large, yet they are restrained by those at the conclusion. For the lessor is there empowered to compel the acceptance by the assignees, or to obtain possession of the premises; but a lessee has no such remedy against the assignees: so that if the clause were held applicable to such a case, he would be deprived of an advantage without any thing being given to him in recompence for it. This, therefore, shews that the previous part of the clause must be confined to the lessor and lessee, or to the lessor and the assignee of the lease; and, besides, the section does not extend to the case of a surety even after the assignees of a bank-

a bankrupt have accepted the lease, *Inglis* v. *M'Dougal.* (a)

1820.

TAYLOR against YOUNG.

Campbell in reply. Here the action is against the bankrupt, which distinguishes this case from that last cited. If this were held to be the true construction of the clause, the whole object would be defeated by the assignee of the lease giving a bond to the lessee. Though the lessor is alone mentioned in the latter part of the clause; yet the former part is sufficient to include this case. The statute ought to be construed liberally in favour of the bankrupt.

ABBOTT C. J. I am of opinion that in this case the judgment should be affirmed. Upon the first point which has been made, I have intimated my opinion in the course of the argument; and the ground of my opinion is shortly this, that the entire value of the bond could not have been proved, because it is manifest that an indemnity is incapable of being estimated, and I am not aware of any case in which a partial proof under such a bond as this has been admitted. Besides, supposing even that it could be admitted, it is clear that a party can only prove in respect of something then actually due to himself. Here, therefore, the plaintiff, who had made no such actual payment, clearly could not prove under the commission. The general plea of bankruptcy, therefore, is no bar to the present claim. I am also of opinion, that the plea founded on 49 *G. c.* 121. *s.* 19. is no bar to the action. It is quite clear that but for that act the defendant would have been liable; and the plaintiff

(a) 1 *B. Moore,* 196.

is

1820.

Taylor *against* Young.

is not to be deprived of his vested right of bringing an action by a strained construction of the act of parliament. For the Court ought, upon reading the whole of the section, to give a reasonable construction to it. Now, looking at it in that view, I think that this claim is, in sound construction, confined to cases arising between the lessor and lessee. By it the lessor is deprived of his remedy in case the assignees should accept the lease; but by the proviso a benefit is given to him in return for this, because he can compel the assignees, either to accept the lease or to deliver up the possession. Here the plaintiff is not in the situation of lessor, but of lessee, and could have no benefit under this proviso. The reasonable construction, therefore, is to say, that the former words of the clause, although very large, do not extend to cases between the lessee and his assignee of the lease. If any inconvenience result from this, it will be for the legislature to remedy it. I am, therefore, of opinion, on both points, that the judgment should be affirmed.

Bayley J. I concur upon both points. The plaintiff, who was the original lessee, although he assigned over the premises, still continued liable to the covenants in the lease, and he therefore took a bond, upon which this action is brought, by which he stipulated that the assignee should pay the rent, perform the covenants of the lease, and indemnify him in case of any breach of covenant on his part. The breach then assigned upon this bond is the permitting a certain portion of rent to be in arrear to the lessor. It does not appear, however, that the plaintiff has paid that sum of money. As to the plea of bankruptcy generally, that depends on the question, whether the plaintiff could have

proved

1820.

TAYLOR *against* YOUNG.

proved this as a debt under the commission. The cases which have been cited, are those where the condition was for the performance of a specific act, the whole of which is a matter of pecuniary compensation. Here, however, that cannot be done; for how far the plaintiff may be damnified by any future breaches is a matter wholly incapable of calculation. There is another objection too, that no money has, in fact, ever been paid by the plaintiff, and therefore even if the bond had been only to indemnify against the breaches occurring previously to the bankruptcy, the plaintiff could not have proved under the commission. Upon both these grounds, therefore, it is clear, that that plea is bad. As to the second point, it seems to me, that the 49 *G.* 3. *c.* 121. *s.* 19. only applies to cases arising between the lessor and lessee. We must judge from the language of the act what was its purpose, and the words ought to be strong indeed to take away a benefit without an equivalent, which would be the case here; for the proviso which gives the advantage extends only to lessors. I, therefore, think that the judgment must be affirmed.

HOLROYD J. I am of the same opinion. The certificate is no bar to the action, unless the debt could have been proved under the commission. In the case of a bond with a penalty, the penalty is not the debt actually proved; but that which is proved by reason of a penalty is that which can be valued as a debt. In this case, there was nothing which could constitute a debt due to the plaintiff, because no money was ever paid by him. Upon the second point, I am clearly of opinion that this case does not fall within the 49 *G.* 3. *c.* 121. *s.* 19. The clause in question only applies to cases between the lessor

1820.

Taylor *against* Young.

lessor and lessee, or between the lessor and the assignee of the lease. It deprived the lessor of a remedy, in order to relieve the bankrupt from the inconvenience of his remaining liable to the payment of the rent after the acceptance of the lease by his assignees. In return for this it gave to the lessor the advantage of either compelling the assignees to accept the lease or to give up the possession of the premises; but it does not give this advantage in the case of assignor and assignee of the lease. For the latter, in case he becomes bankrupt, is absolved from the further payment of rent by the acceptance of his assignees, and no inconvenience arises to him, except as in the present case, by reason of an express covenant with the assignor. Now I think that the words of the statute do not extend to relieve him from the express contract made in the present case; for the plaintiff would lose his remedy without having any corresponding advantage in return for it.

Best J. I am of the same opinion. Unless the words of 49 *G.* 3. *c.* 121. *s.* 19. expressly prohibit an action like the present, we ought not to deprive the plaintiff of his remedy. It does not seem to be either within the words of the clause, or within the contemplation of the legislature. It seems to me, that it is confined to the case of lessor and lessee. It has been contended that this is an action brought in respect of the non-performance of the covenants in the lease; but that must be confined to actions brought upon the lease in respect of such covenants. This, however, is not brought upon the lease, but upon the bond of indemnity given by the defendant. I, therefore, think that the statute does not extend to a case like the present. The

judg-

judgment of the Court of Common Pleas must, therefore, be affirmed.

1820.

TAYLOR *against* YOUNG.

Judgment affirmed.

NEEDHAM *against* KIRKMAN.

Friday, April 28th.

Where *A.* being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate and effects whatsoever and wheresoever, to and amongst the children both of his first and second marriage, share and share alike: Held, that this covenant was applicable only to such real and personal estate of which *A.* might die seised or possessed, and that it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement.

THE Vice Chancellor sent the following case for the opinion of this Court. By indentures of lease and release, of the first and second days of *October*, 1802, the release made between *John Needham*, of the first part, *John Burton*, of the second part, *Anne Burton*, spinster, daughter of the said *John Burton*, of the third part, and *Charles Dodsworth* and *James Butler*, of the fourth part, being the settlement made previously to and in contemplation of a marriage between the said *J. Needham* and *Anne Burton*, the said *J. Needham* released and confirmed unto the said *C. Dodsworth* and *J. Butler*, and to their heirs and assigns, several lands and hereditaments in *Heather*, in the county of *Leicester*, in the said indentures described: to hold the same unto the *C. Dodsworth* and *J. Butler*, their heirs and assigns; to the use of the said *J. Needham* and his heirs, until the said intended marriage; and after the solemnization thereof, to the use of the said *J. Needham*, and his assigns, for his natural life, with remainder to the use of the said *C. Dodsworth* and *J. Butler*, and their heirs, during the life of the said *J. Needham*, in trust, to preserve contingent remainders; and after his decease, in trust and to the

intent

1820.

NEEDHAM *against* KIRKMAN.

intent that the said *Anne Burton*, and her assigns, if she should survive the said *J. Needham*, might, out of the said hereditaments, take, during the term of her natural life, for her jointure, and in bar of dower, an annual rent of 60*l.*, to be paid half-yearly; and as to, for and concerning the said hereditaments, after the decease of the said *J. Needham*, subject to the said annual rent of 60*l.*, and to the powers and remedies thereby given for the recovery thereof, to the use of all and every the child and children of the body of the said *J. Needham*, both by his late wife *Hester*, therein mentioned to be deceased, and by the said *Anne Burton*, his intended wife, and of the respective heirs and assigns, for ever, of all and every such child and children, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common, and not as joint tenants; and in default of all such issue, then to the use of the said *J. Needham*, his heirs and assigns, for ever. And the said *J. Needham* did, in consideration of the said intended marriage, for himself, his heirs, executors, and administrators, covenant with the said *C. Dodsworth* and *J. Butler*, their heirs, executors, and administrators, that in case the said intended marriage should take effect, and there should be any issue of such marriage, then and in such case he the said *J. Needham should and would, by his last will and testament, or otherwise, give, devise, and bequeath all other his real estates, and also all his personal estate and effects whatsoever and wheresoever, unto and amongst all and every the children of his body, whether born of the body of his late wife Hester, or to be born of the body of the said* Anne Burton, *his said intended wife*, and their heirs, executors, and administrators, respectively, according to the nature and quality of such his estates, share and

shar

1820.

NEEDHAM *against* KIRKMAN.

share alike, as tenants in common, and not as joint tenants, except such parts thereof as he might thereafter in his life-time give, devise, or bequeath, unto or to the use of the said *Anne Burton*. The marriage between the said *J. Needham* and *Anne Burton* was soon after solemnized, and the said *Anne* is since dead, and there are several children now living, the issue of such marriage. There were also born to the said *J. Needham*, of the body of the said first wife, *Hester*, several children who are now living. At the time of making the above mentioned indentures of the first and second days of *October*, 1802, the said *J. Needham*, who was still living, was seised in fee simple of certain lands, situate in the parish of *Church Griesley*, in the county of *Derby*, and the tithes thereof arising and growing; and since the date and execution of the indentures, the said *J. Needham* purchased other lands, and the tithes thereof, also situate in the said parish of *Church Griesley*, and which were conveyed to the said *J. Needham* in fee simple. And the said *J. Needham*, in *December* 1817, sold and duly conveyed the whole of his said lands, so situate in the said parish of *Church Griesley*, as aforesaid, with the tithes thereof, to *John Kirkman*, the purchaser thereof, his heirs and assigns, for his and their own use and benefit. The question for the opinion of the Court was, whether, in case the said *J. Needham* should depart this life, leaving such children as aforesaid, without having procured a re-conveyance of the lands and tythes so sold and conveyed to *John Kirkman*, so that he should be unable, by his last will, or otherwise, to give, devise, or bequeath the same to and amongst his children, he would be guilty of a breach of the covenant entered into by him in his said settlement, to give,

 devise,

1820.

NEEDHAM *against* KIRKMAN.

devise, and bequeath, by his last will or otherwise, all other his real estate, in the manner therein mentioned.

The case was argued by

Sugden, for the plaintiff. The question is on the construction of this covenant, whether it applies to the real estates only of which *John Needham* should die seised, or to those of which he was seised at the time of making the covenant, and to that also which he might subsequently acquire. The covenant is, that he would, by his last will, devise all other his real estates, and also all his personal estate and effects whatsoever, amongst the children of both marriages. Now a covenant to settle all his personal estate, clearly operates only on that of which a man dies possessed. *Lewis* v. *Madocks*. (*a*) There the Lord Chancellor determined, that all expenditure, &c. not fraudulent, on the part of the husband, was authorised under such a covenant. Here the real and personal estate are both included in the same covenant, and it would be strange if the same construction were not to prevail as to both. The form of the question shews, that *Needham* has the power to sell, for it is whether he will be guilty of a breach of the covenant, unless he procures a *re-conveyance*. He has, therefore, a power of alienation. The only object of the covenant was, to place the children of both marriages on an equality; and that will be done, whether this be in the situation of real or of personal property.

Preston, contrà. It does not follow, that, because the personal estate only of which *Needham* should die pos-

(*a*) 17 *Ves.* 48.

sessed

1820.

NEEDHAM *against* KIRKMAN.

sessed would be bound by this covenant, therefore, the real estate must follow the same rule; for they differ in many important particulars. As, for instance, in wills, the real estate is considered as specific property, and the personal estate is not. In the case of *Lewis* v. *Madocks* (*a*), the words were, "all and singular the goods, &c., personal estate or effects that he should at any time, during the joint lives of him and of his intended wife, be possessed of;" and the Lord Chancellor decided, that the personalty laid out in the purchase of a real estate, was to be considered as a lien on the estate in the hands of the heir. Here, how is it possible to get over the words "and all other my real estates?" The settlor had previously bound some estates by the settlement; and it is stated that he was then also seised of others. Those estates, therefore, clearly must be the estates meant, when he speaks of all other his real estates. The proper construction of the covenant will, therefore, be, to hold it applicable to all the real estates of which the settlor was seised at the date of the instrument, and to the personal estate of which he should be possessed at the time of his death, with a lien on the estates he might subsequently acquire for the amount of the personal estate laid out in the purchase of them by him.

Sugden, in reply. It is admitted, that over the personal estate, the party has full power for the purposes of expenditure. The party can only distribute according to the covenant, share and share alike, amongst the children. The settlement is perfectly regular, as to a

(*a*) 8 *Ves.* 150.

1820.

NEEDHAM *against* KIRKMAN.

part of the estates of which *Needham* was seised; and as to the rest, it is plain his object was, to retain the dominion over them; or, otherwise, there is no reason why they should not have been included. Besides, the covenant is itself contingent; for it was to have no effect unless there were issue of the second marriage. It could not, therefore, be a lien on the other estates. It cannot be disputed, that *Needham* may sell the estates, for he has his whole life to perform the covenant. It would, therefore, be absurd to put such a construction on it, as would compel him to re-purchase. That, therefore, shews, that the other construction is bad. And, besides, if that were adopted, the real estates subsequently acquired, would not be bound, even though he died seised of them, which would be a detriment to the children, whereas the construction contended for by the plaintiff, would give the children the advantage of having all the estate, both real and personal, belonging to *Needham* at his death, bound by the covenant.

The following certificate was afterwards sent. This case has been argued before us, and we are of opinion, that in the event mentioned in the question proposed to us, *John Needham* will not be guilty of the breach of the covenant therein mentioned.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

HAWKER and Another *against* HAWKER and Others.

Friday, April 28th.

A testator, by his will, devised all his real estates in several parishes to trustees, their heirs and assigns, for ever, upon trust to sell his estate at *H.* to pay his debts; and in case it should not be sufficient, then, as to his estate at *F.* upon trust, to sell that also, to make good the deficiency; but in case it should not be necessary, then, as to his estate at *F.* and his other remaining estates in trust, to receive the rents and profits till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at *F.*, if it should be sold, to his daughter, upon coming of age, and from that period to the use of the trustees for the life of his daughter, and after her death to the use of her children; and by a codicil to his will, in which he made an alteration as to the trustees, the testator devised his estates to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid, in trust as aforesaid." It appeared that the estate at *H.*, when sold, was alone sufficient to pay the debts: Held, that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at *F.* and elsewhere.

THE Vice-Chancellor sent the following case for the opinion of this Court: *Edward Baker*, late of *Hill Court*, in the parish of *Grafton Flyford*, in the county of *Worcester*, Esq. deceased, was, at the time of making and publishing his last will and testament, and from thence to the time of his decease, seised in fee-simple of several messuages, lands, tenements, and hereditaments, situate in the several parishes of *Grafton Flyford*, *North Piddle*, and *Flyford Flavel*, in the county of *Worcester*. And being so seised, he duly made and published his last will and testament in writing, bearing date the 3d day of *July*, 1802, and which was duly executed and attested as by law is required for devising real estates, and thereby gave and devised unto the defendants, *Benjamin Johnson* and *George Penrice*, and to *John Symonds*, Esq. since deceased, and *Henry Wakeman*, therein described, all and singular his freehold estates in the several parishes of *Grafton Flyford*, *North Piddle*, and *Flyford Flavel*, or elsewhere in the kingdom of *Great Britain*, to hold to them, their heirs and assigns for ever, upon trust that they should, as soon as convenient after his decease, sell and dispose of his

1820.

HAWKER *against* HAWKER.

estate, lands, tenements, and hereditaments and premises, situate at *Himbleton*, being part of the said hereditaments; and by and with the money arising from such sale should pay off and discharge all his just debts; and in case it should not produce a fund sufficient for that purpose, then, as to all those his messuages, farms, lands, tenements, and hereditaments, situate, lying, and being in the parish of *Flyford Flavel*, in the county of *Worcester*, upon trust to sell and dispose thereof, and by and out of the money arising from the sale thereof to dispose of as much of the principal money as would be sufficient to make good the payment of his debts; and to pay, apply, and dispose of the surplus money as was thereinafter directed. But in case it should not be necessary to dispose of the same as aforesaid, then as to, for, and concerning his estate at *Flyford Flavel*, *Grafton Flyford*, *North Piddle*, or elsewhere, in trust to receive the rents, issues, and profits thereof, during the minority of his daughter, the defendant, *Mary Hawker*; but in the mean time, and until she attained her age of twenty-one years, to pay and apply so much of the rents and profits of the said premises as his said trustees, or the survivors or survivor of them, or his heirs, should think fit, together with the interest or produce of any surplus money arising from the sale of his estate at *Flyford Flavel*, should the sale of such estate be found necessary, for the maintenance and education of his daughter *Mary*, until she should have attained her said age of twenty-one years. And he thereby directed that the said trustees should, when and as soon as his said daughter should have attained the age of twenty-one years, render to her a joint account of and concerning the said monies and trust-estates, and

1820.

HAWKER *against* HAWKER.

and of the rents, issues, and profits thereof, after all just allowances made; or, if it should be necessary to make sale of the *Flyford* estate for the purpose aforesaid, of all surplus money remaining in their hands, with interest thereon, and pay the same accordingly. And from and immediately after his said daughter should arrive to the age of twenty-one years, then, as to his said estates, to the use and behoof of the said *Benjamin Johnson*, *John Symonds*, *Henry Wakeman*, and *George Penrice*, their heirs and assigns, for and during the natural life of his said daughter *Mary*, for preserving and supporting the contingent uses and remainders thereinafter limited from being defeated and destroyed. And, for that purpose, to make entries and bring actions as occasion should require. But, nevertheless, to permit and suffer his said daughter, and her assigns, to receive and take the rents, issues, and profits thereof, and of every part and parcel thereof, for her and their own use, for and during the term of her natural life. And from and immediately after the death of his said daughter *Mary*, then to the use and behoof of all and every the children of his said daughter *Mary*, lawfully begotten, share and share alike, to hold as tenants in common, and not as joint-tenants. And in case his said daughter should happen to die under the age of twenty-one years, and without issue, then his will was, and he thereby ordered and directed his said trustees should account with and pay the balance due on the aforesaid trust account unto and to the use of such person as should by that his will be next in remainder, and entitled to his aforesaid estates and hereditaments, after the decease of his said daughter. And in case she should die before she arrived at the age of twenty-one

 years,

1820.

HAWKER *against* HAWKER.

years, or, surviving, should die without lawful issue, then, as to his aforesaid estates, to the use and behoof of his nephew, *Wm. Flindall*, of *Colchester*, in the county of *Essex*, and to the heirs male of his body lawfully issuing, successively in tail male as they should happen to be in seniority of age, and of the several and respective heirs male of their several and respective bodies issuing, the elder of such son and sons, and the heirs male of his body, being always preferred before the younger of such son and sons, and the heirs male of his body. And for default of such issue, then he gave all his said lands, tenements, and hereditaments unto his cousin *John Paine*, to hold to him, his heirs and assigns for ever.

The said testator, *Edward Baker*, duly made and published a codicil to his said will, bearing date the said 3d day of *July*, 1802, and which was duly executed and attested as by law is required for devising real estates, and thereby declared that to be a codicil to his last will and testament. And as to, for, and concerning the devise of the said estates in remainder to his nephew, *William Flindall*, in tail to his male issue, he revoked that part of his will, and declared the same to be in trust for all and every his the said *William Flindall's* children, share and share alike, as tenants in common and not as joint-tenants, if such contingency should happen, and their father had been next in remainder, with full power to his said trustees to sell such estates, and divide the money amongst them. The said testator, *Edward Baker*, duly made and published another codicil to his said will, dated the 17th day of *March*, 1804, and which was duly executed and attested as by law is required for devising real estates, and thereby, after

reciting

reciting that he did, on or about the 3d day of *July*, 1802, duly make and execute his last will and testament in writing, and therein and thereof did nominate, constitute, and appoint *Benjamin Johnson*, *John Symonds*, *Henry Wakeman*, and *George Penrice*, executors and trustees. And, after reciting the said codicil hereinbefore set forth, the said testator devised to his said trustees and executors, and to the survivors and survivor of them, and the heirs of such survivor, such estates as aforesaid, in trust as aforesaid. And he did revoke the nomination and appointment of the said *Henry Wakeman* to be a trustee and executor under his said will, and in the room and stead thereof did nominate, constitute, and appoint the defendant, *Richard Nash*, jointly with the said *Benjamin Johnson*, *John Symonds*, and *George Penrice*, trustee and executor under his will; and in all other respects he ratified and confirmed the same, with the codicil thereto, and declared that to be another codicil to his said will. The said testator, *Edward Baker*, departed this life on or about the 13th day of *September*, 1806, without having revoked or altered his said will, save as the same was revoked or altered by the said two codicils, and without having revoked or altered his said codicils, save as the former was revoked or altered by the latter. And the said testator left the said defendant, *Mary Hawker*, his only child and heiress at law, and the said *John Symonds* hath since departed this life. No part of the said hereditaments in *Flyford Flavel* hath been sold, it not being necessary to sell the same for the payment of the said testator's debts. The said defendant, *Mary Hawker*, intermarried with the said defendant, *Charles Hawker*, in the month of *August*, 1807, and afterwards, and on

the

1820.

HAWKER *against* HAWKER.

the 9th day of *September*, 1811, attained her age of twenty-one years. The question for the opinion of the Court of King's Bench was, What estate do the said defendants, *Benjamin Johnson*, *George Penrice*, and *Richard Nash*, take in the said hereditaments in *Grafton Flyford*, *North Piddle*, and *Flyford Flavel*, by virtue of the said will and codicils of the said *Edward Baker*.

Blake, for the plaintiffs, contended, that the object of the testator would be best accomplished by holding that the trustees took an estate for the life of *Mary Hawker*, with a power of sale in case of necessity as to the estate of *Flyford Flavel*. As to the other estates, the uses declared were to the trustees during the life of *Mary Hawker*, and after her death to her children; and there was nothing to be done by the trustees after the death of *Mary Hawker*. There is nothing, therefore, which makes it at all necessary that the trustees should take any estate beyond her life. The words in the will as to the sale of *Flyford Flavel* were conditional. The testator only directed a sale in case the estate at *Himbleton* should not prove sufficient, he expressly contemplates the probability of no such necessity existing; and, therefore, in the event of its not being required, gives it to the same uses as the other estates; until the necessity arose, the estate should pass to the persons for whom the uses was declared, a power of sale only immediately vesting in the trustees as in the case of a devise that land should be sold by executors; *Gilbert on Uses*, 127. The present case is like that of *Lady Jones* v. *Say and Sele*. (*a*) The trustees are to

(*a*) 3 *Bro. P. C.* 127. 8 *Vin. Ab.* 262.

have

1820.

HAWKER against HAWKER.

have no greater estate than is necessary for the purposes of the trusts; *Doe, dem. White,* v. *Simpson.* (*a*) If it be held that the trustees take the whole fee, then the daughter will take an equitable estate for life, with an equitable remainder to her children; and, considering "children" as a word of limitation, this will give her an estate tail which she may destroy by recovery; whereas, if the trustees take an estate for her life only, there will be a legal remainder to her issue, and this will not give her an estate tail, but will preserve the property for the children.

Treslove, contrà. If this question stood on the will alone, the case of *Lady Jones* v. *Say and Sele* would be a strong authority for the plaintiff's argument, that these trustees have the legal estate during the life of the daughter, and that after that event the legal estate would be in the children. The only difference between the two cases is, that in Lord *Say* and *Sele*'s case the will contained an express declaration, that the devisees shall "stand and be seised," which are the identical words of the statute of uses. But the real question is on the second codicil, by which the estates are given to the devisees, and to the survivors and survivor of them, and the heirs of such survivor. Now, as it cannot be ascertained who the survivor will be, the devisees cannot take a vested fee: they take only a joint estate for their lives, with a contingent remainder in fee to the survivor, as was admitted in *Vick* v. *Edwards.* (*a*) In order to execute a use the party must be seised, the word "seised" being the only word used in the statute of uses.

(*a*) 5 *East,* 162. (*b*) 3 *P. W.* 372.

1820.

HAWKER *against* HAWKER.

uses. Here the devisees are not seised of the fee, by reason of the contingency to the survivor, and therefore no use in fee is executed; and although they are seised for a joint estate for their lives, a use cannot be executed out of this seisin to themselves, their heirs and assigns, "during the life of the daughter," which are the words used in the will. The form of devise used in the second codicil is inconsistent with the execution of a use under the will: not only the fee is devised in contingency, but the testator adds, "in trust as aforesaid," meaning strictly a trust, and not a use. The consequence is, that no use is executed; but the trustees take a joint estate for their lives, with a contingent remainder in fee to the survivor.

Blake, in reply. Such a construction of the codicil cannot be adopted. It would prejudice the power of sale given to the trustees, for they could not convey a clear fee to a purchaser: all that they could do would be to bar the heirs of the survivor by a fine operating as an estoppel. The title to the fee must be left, in effect, in abeyance during their lives. This the Court would, if possible, avoid. It is immaterial whether there was a seisin here co-extensive with the use: there may be such a seisin in the case of a deed, but not in the case of a will. In the case of a deed, the Court is governed wholly by the statute of uses; but in the case of a will, the Court acts under the statute of wills, taking a rule of construction from the statute of uses, and therefore holding the legal estate vested by devise in the person in whom the use would be executed, if the conveyance were by deed. It is therefore settled, that a devise to the use of *A.* vests the legal estate in *A.*, though there

is

1820.

HAWKER *against* HAWKER.

is no seisin created to feed that use. The question, therefore, is, for whom was the first use or trust declared? Now, the codicil devises the estates on the same trusts as the will; therefore, the effect of the codicil was to give the same estates as the will; and it is admitted in the argument on the other side, that the will gave the estates which the plaintiff contended for, namely, an estate in fee in the estate at *Himbleton*, and an estate for the life of the daughter in the others. If the codicil altered the will in the way suggested by the defendants, then the trustees would not take a fee in *Himbleton*, though it were expressly devised to be sold out and out; and they would be thus unable to carry into effect any of the declared intentions of the testator.

The following certificate was afterwards sent:

THIS case has been argued before us by counsel; and we are of opinion that *Benjamin Johnson*, *George Penrice*, and *Richard Nash*, take to them, and the survivors and survivor of them, and the heirs of the survivor, only an estate for the life of the testator's daughter *Mary*, in *Grafton*, *Flyford*, *North Piddle*, and *Flyford Flavel*.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

1820.

Friday, May 2d.

DOE, on the Demise of KING and Wife, *against* CATHERINE FROST.

A testator having a son and daughter, and the latter having several children, devised to his son *W. F.* in fee; and if he should have no children, child, or issue, the said estate was, on the decease of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* might leave to the younger branches of the family: Held, that *W. F.* took, under this will, an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir at law of the testator.

EJECTMENT for certain premises, situate in the county of *Cambridge*. At the trial, before *Abbott* C. J., at the last Summer assizes for that county, the jury found a special verdict, which stated the following facts. *William Frost*, being seised in his demesne, as of fee, of and in the manor of *Brinkley*, in the county of *Cambridge*, and of certain lands and tenements in the several parishes of *Brinkley*, *Wellingham*, *Carlton*, and *Westley*, in the said county, being the manor, lands, and tenements in the said declaration mentioned, and which said premises were all purchased at one time by the said *W. Frost*, and were altogether legally conveyed to him by one conveyance, by his will on the 6th day of *April*, 1805, duly made and executed, so as to pass freehold estates, amongst other things, devised as follows; that is to say; "I give and bequeath to my well beloved son, *William Frost*, of the parish of *Brinkley* and county of *Cambridge*, farmer, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; also I give to my well-beloved wife, *Rebecca Frost*, the sum of 100*l.*, yearly and every year, during her natural life, to be paid her by the aforesaid *W. Frost*, half-yearly, out of the estate; and if the said *W. Frost* should have no children, child, or issue, the said estate is, on the decease of the said *W. Frost*, to become the property of the heir at law, subject to such legacies as he the said *W. Frost* may leave by will to any of the younger branches of the family." After making the said will,

will, to wit, on the 25th day of *August*, 1807, the said *W. Frost*, the testator, died so seised as aforesaid, of the premises in the will mentioned, being also the premises in the declaration mentioned, and without having revoked or altered his will, and leaving *Rebecca*, his wife, him surviving, and leaving issue of his body, lawfully begotten, namely, *William Frost*, the devisee named in the will, his only son and heir at law, and *Rebecca*, the wife of *Robert King*, in the said declaration mentioned, and no other issue. *W. Frost* the younger, the devisee in the will mentioned, had been in the possession of the estate devised to him by his father, the said *W. Frost*, the testator, a certain space of time, to wit, for seven years before his father's decease, and became seised thereof on the death of his said father, and continued so seised thereof until and at the time of his death. After the death of the said *W. Frost* the father, the said *W. Frost* the younger, still continuing seised of the premises aforesaid, in the said declaration mentioned, by his last will and testament, duly made, so as to pass freehold estates, on the 10th day of *July*, 1810, devised, amongst other things, as follows; that is to say, first, "I do, as far as I lawfully or equitably may or can, by virtue and in pursuance of the last will and testament of my late father *W. Frost*, of the parish of *Woodditthen*, and county of *Cambridge*, farmer, deceased, bearing date the 6th day of *April*, 1805, give, devise, and beqeath the following legacies, to be issuing and payable out of all his houses and lands, with all their appurtenances thereunto belonging, which, in and by his said last will and testament, he gave and bequeathed to me and my heirs for ever; and who, by his said last will, gave to his well-beloved wife, *Rebecca Frost*, the sum of

100*l.* of

1820.

DOE *against* FROST.

100*l.* of good and lawful money, yearly and every year during her natural life, to be paid her by me half-yearly out of the estate; and if I should have no children or issue, the said estate was, on my decease, to become the property of the heir at law, subject to such legacies as I might leave by will to any of the younger branches of the family; that is to say, to my niece *Rebecca Frost King*, the daughter of *Robert King* and *Rebecca* his wife, my sister, the sum of 1000*l.* of lawful money of the United Kingdom of *Great Britain* and *Ireland*, current in *England*. To my nephew *James King*, the son of the said *Robert King* and *Rebecca* his wife, the sum of 4000*l.* of such like lawful money as aforesaid. To my niece *Matilda King*, the daughter of the said *Robert King* and *Rebecca* his wife, the sum of 1000*l.* of such like lawful money as aforesaid; and to my nephew *John Lyles King*, the son of the said *Robert King* and *Rebecca* his wife, the sum of 2000*l.* of such like lawful money as aforesaid. Also, I give and devise unto my wife *Catherine*, all and every my manors, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, with their and every of their rights, members, and appurtenances; to hold to her my said wife, her heirs and assigns, for ever." On the 26th day of *October*, 1818, the said *William Frost*, the younger, died, seised of the premises in the declaration mentioned, without having revoked or altered his said will, leaving the said *Rebecca King*, in the said will mentioned, and in the said declaration also mentioned, the wife of *Robert King*, in the said declaration also mentioned, his sister and heir at law. After the death of *William Frost* the younger, and before the time of the trespass

in

1820.

Doe *against* Frost.

in the said declaration mentioned, the said *Catherine Frost*, widow of *William Frost* the younger, in the will of the said *William Frost* the younger mentioned, and the defendant in this suit, entered upon the premises mentioned both in the will of *William Frost*, the father, and also in that of *William Frost* the younger, and continued in the possession of the same. *Rebecca King* had lawful issue, to wit, an eldest son named *William King*, and four other children, all of whom were living at the time of the making of the will of *William Frost*, the first testator, and who are also now living. *William Frost* the younger was, at the time of making his will, seised in fee of other estates besides those devised to him by his father, but of no other manor than the manor of *Brinkley*. The special verdict then proceeded in the usual way to state the lease, entry, and ouster by the defendant.

Sugden, for the lessors of the plaintiff, made two points, first, that the estate which *W. Frost* the younger took under his father's will was an estate in fee, with an executory devise over, in case of his death without issue, to the person who should then be the collateral heir of the family. In that case the estate, in the event which has happened, has descended on Mrs. *King*, his sister. The words of the will are, "I give to my son *W. F.* and his heirs for ever, all my houses and lands, &c. Also, I give to my wife 100*l.* a-year, to be paid by *W. F.* half-yearly out of the estate; and if the said *W. F.* should have no children, child, or issue, the said estate is, on the decease of the said *W. F.*, to become the property of the heir at law, subject to such legacies as he the said *W. F.* may leave by will to any of the

1820.

Doe *against* Frost.

younger branches of the family." Here the estate was to go over on the decease of *W. F.*, and subject to legacies to be devised by him. It is clear, therefore, that this does not point to an indefinite failure of issue, but only to a failure of issue at the time of *W. F.*'s decease. In that case the executory devise over is good; *Porter* v. *Bradley* (*a*), *Roe* v. *Jeffery*. (*b*) Nor can the word "issue," which is here introduced, make a difference; for in *Doe* v. *Webber* (*c*) the words "child or children" were construed as synonymous with "issue." The introduction of that word, therefore, will not alter the case here. Then, who was intended to take under the executory devise? The devise is, that the estate is to become the property of the heir at law, subject to such legacies as *W. F.* may leave to the younger children of the family. It is clear that *W. F.* could not be himself meant; for that supposition would make the devise over altogether nugatory, and the power of devising legacies would have been also unnecessary. If that supposition be excluded, then the only other person who can be intended must be the person who should be heir at law at the time of the death of *W. F.* That person was the sister of *W. F.*, who is one of the lessors of the plaintiff. But, secondly, supposing the true construction of the father's will to be, that the son took an estate tail, with the reversion in fee to himself afterwards, still the estate, not having been disposed of by his will, descends upon his sister as the heir at law. It will be contended on the other side, that it passed to his widow under the general words of the devise to her.

(*a*) 3 *T. R.* 143. (*b*) 7 *T. R.* 589. (*c*) 1 *B. & A.* 720.

But

1820.

Doe *against* Frost.

But it may clearly be shewn, that it was not his intention to pass them under these words; for he begins by adverting to the property he took under his father's will, and he calls that property "*his* lands," &c. He then, after reciting his father's will, by which the estates were to go to the heir at law at his (the son's) decease, executes the power given to him of devising, by giving legacies to the four younger children of his sister. It is clear, therefore, as far as language can speak, that he supposed the estate was to go over on his death to his sister, by which means the eldest son, whom he omits altogether as a legatee, would be provided for. Then it is that he devises afterwards to his wife in these words: "All *my* manors, messuages," &c. He meant, therefore, clearly, only to leave to her the property of which he died seised, independently of that derived under his father's will; and, as to that he died intestate, supposing him to have had the right of disposition of it. It is found indeed as a fact, that he had no manor, except the one under his father's will. That shews that the word "manors" in the devise to his wife could only be used as a general expression. And in *Roe* v. *Reade* (a) it was held, that under general words of devise an estate did not pass, where it appeared from the other parts of the will that the testator could have had no intention of including it. And *Roe, dem. James,* v. *Avis* (b), *Goodtitle* v. *Miles* (c), *Smith* v. *Saunders* (d), *Amesbury* v. *Brown,* cited in 2 *Blac.* 739., and *Doe* v. *Underdown,* C. P. 15 *G.* 2., cited in 2 *Blac.* 737., are authorities to shew that the Court will exclude from the ge-

(a) 8 *T. R.* 118.
(b) 4 *T. R.* 605.
(c) 6 *East,* 494.
(d) 2 *Black.* 736. *Cowp.* 420.

 neral

1820.

Doe against Frost.

neral words of the residuary clause of a will such estates as it appears not to have been the testator's intention to devise. [*Abbott* C. J. Does the will go further than to shew, that the son supposed that he might not have the power of disposing of the estate derived under his father's will. Is there any thing to shew that he did not intend to devise all that he had the power of devising to his wife? *Holroyd* J. He has not so far confirmed his father's will as to give the estates under it to his own heir at law. *Bayley* J. *Goodright* v. *Downshire* (a) is an authority to shew that property which was not in the contemplation of the testator will, nevertheless, pass under the general words of the residuary devise.]

Shadwell, contrà. *William Frost*, under his father's will, took an estate tail, with the reversion in fee, either under the will, or, if undisposed of by the will, then it descended on him as heir at law. Where a testator indicates an intention that the devise over is not to take effect, so long as there is any issue of the first devisee, it has been held always, that such devisee takes an estate tail. *Brice* v. *Smith* (b), *Dansey* v. *Griffiths* (c), *Wood* v. *Baron*. (d) The case of *Wyld* v. *Lewis* (e) is a strong authority. There the devise was to the wife, and if she should have no son or daughter by the testator, and for want of such issue, then the premises to return to the testator's brother *J. W.*, if he shall be then living, and his heirs for ever, he paying to his two brothers, *A.* and *B.* 150*l.* within one year after

(a) 2 *Bos. & Pul.* 600.
(b) *Willes*, 1.
(c) 4 *M. & S.* 61.
(d) 1 *East*, 259.
(e) 1 *Atk.* 432.

the

the decease of the testator's wife. And there the Lord *Chancellor* held, that the wife took an estate tail. Yet, in that case, the devise over was to a persona designata, and he was to pay a definite sum of money within a definite time after the death of the first devisee. Here the devise over is to the heir at law. Now such a devise ought to be unambiguous, or otherwise the heir at law of the testator will, according to the rule of law, take the reversion in fee. The rule of law is, that estates should be held to vest, if possible. *Purefoy* v. *Rogers* (*a*), *Doe, dem. Lord Cholmondeley,* v. *Maxey* (*b*). The true construction here is, that the estate should, upon the determination of the estate tail, go to the heir at law of the testator, at the time of his death. Such a construction was given in the cases of *Doe* v. *Lawson* (*c*) and *Holloway* v. *Holloway.* (*d*) Much reliance is placed on the clause relative to the power of giving legacies. It does not appear that the testator was not, at the time of making his will, inops consilii. If so, he might not be aware that, by this devise, he had previously given the fee to his son, and so made the power of devising legacies unnecessary; or perhaps he might have intended to give him a power over the reversion, independently of any estate in it, or the power of leaving legacies might be intended to operate on the estate tail, as well as on the reversion in fee. It is to be observed, that these legacies to be given, were to persons not then in esse, and no time of payment is specifically mentioned. The case, therefore, of *Wyld* v: *Lewis* is much stronger than the present. If there be any doubt on the face of the will,

(*a*) 2 *Saund.* 380.
(*b*) 12 *East,* 589.
(*c*) 3 *East,* 278.
(*d*) 5 *Ves. jun.* 399.

1820.

Doe against Frost.

will, the heir at law of the testator will take. On the second point, *Sheppard's Touchstone*, tit. *Grant*, p. 245. and *Pickering* v. *Lord Stamford* (a), are authorities in point. All that can be contended for by the other side is, that *W. F.*, the son, might suppose he had no power to devise the estates; but it is clear, that by the general words of the will, he meant to devise all the lands, &c. of which he had the disposition.

Sugden, in reply, was stopped by the Court.

Abbott C. J. It appears to me, in this case, to have been the plain intention of the testator, that, at the period of the decease of his son, *William Frost*, it should be ascertained, whether the estates devised to him by the will, should then vest in him in fee absolutely, or pass over to some other person, subject to such legacies as the son might, by his will, devise to any of the younger branches of the family. Now, at the time when the testator made his will, it appears, that besides his son, *William Frost*, he had a married daughter, *Rebecca King*, who had five children. It is clear, therefore, that her younger children would be "the younger branches of the family," mentioned by the testator in his will. I think, therefore, that the plain intention of the testator was, that at the time of *William Frost*'s death, without children, the estate should go over to the person who should then be the heir at law, with a power, however, to *William Frost*, in that event, to leave legacies to the younger children of his sister, *Rebecca King*. The

(a) 3 *Ves. jun.* 332. and 492.

lessors

lessors of the plaintiffs, are, therefore, entitled to recover.

Bayley J. I am of the same opinion. If the Court see by the whole frame of the will, that the estate is to continue in the first devisee, so long as he has any lineal descendants, it will follow, that the gift to him is of an estate tail. But if the will gives it to him in fee, there may be then an executory devise over, on the happening of a particular event. Here the will gave the estates to *William Frost*, and his heirs for ever, and if he had no children, child, or issue, the estate was, on his decease, to become the property of the heir at law. It does not seem to me, that this contemplates a devise over on an indefinite failure of issue, but only on the failure of issue at the time of *William Frost*'s death. And the subsequent part of the clause confirms me in this opinion, for, if the will had given an estate tail, with the reversion in fee, to *William Frost*, it would have been wholly unnecessary to have given to him the specific power of charging the estate with legacies. Then who is the heir at law in favour of whom the executory devise is to take effect. The circumstances of the family were these. The testator, besides his son, *William Frost*, had a daughter, *Rebecca King*, who had five children. It seems to me, therefore, that by these words in his will, he meant to give the estate, in case *William Frost* died without leaving issue at the time of his death, to *Rebecca King*, if she should survive her brother, or, if not, then to her eldest son; but with power, in either event, to *William Frost*, to leave legacies out of the estate to the younger children of his sister. This construction, as it seems to me, will give complete effect to the testator's will, and the words

1820.

Doe *against* Frost.

subject to such legacies, &c., may properly be read, as if in a parenthesis. I think, therefore, that *William Frost*, under the will took an estate in fee, with an executory devise over (in the event of his dying, leaving no issue living at his death) to such person as should, in that event, be the heir at law of the testator. The plaintiff is, therefore, entitled to our judgment.

Holroyd J. By the first part of the will, the testator appears to have given an estate in fee to *William Frost*, his son, but he then adds, that if he should have no children, child, or issue, the estate should, on his decease, become the property of the heir at law, subject to such legacies as he, *William Frost*, might leave to any of the younger branches of the family. Now it is clear, that if it appeared, by the subsequent limitation, that the estate was to go over upon an indefinite failure of issue, the previous estate in fee given, would be converted into an estate tail. But I think, in the present case, that the estate was not to go over upon an indefinite failure of issue; for the contingency is, that the estate is, if *William Frost* had no children, child, or iesue, *at his decease*, to go over to the heir at law. The will, therefore, contemplates a failure of issue at the decease of *William Frost*, and the estate in fee is not converted, by the subsequent limitation, into an estate tail. I agree, also, that by the expression "the heir at law," is meant, the person who, at the time of the decease of *William Frost* without issue, should then be the heir at law of the testator.

Best J. concurred.

Judgment for the Plaintiff.

1820.

JERVIS and Another *against* TAYLEUR.

A joint commission of bankruptcy having issued against the tenant for life and the tenant in tail: Held that the assignees, by the bargain and sale, only took an estate for life in the premises, and a base fee in remainder.

BY indentures of lease and re-lease dated the 8th and 9th *November*, the re-lease made between *S. Davies*, Esq. and *Elizabeth* his wife, of the first part, *Peter Davies* (eldest son and heir apparent of the said *S. Davies*, by the said *Elizabeth*, his wife) of the second part, *L. Norcop*, of the third part, and *George Parker* and *R. Sillitoe*, of the fourth part: for the considerations in the said re-lease the said *S. Davies* duly conveyed unto the said *G. Parker* and *R. Sillitoe*, and their heirs, a certain estate therein mentioned, situate at *Almington*, in the county of *Stafford*, with the appurtenances, to hold the same unto the said *G. Parker* and *R. Sillitoe*, their heirs and assigns, to the use of the said *S. Davies*, and his assigns, for life, without impeachment of waste; and after his decease to the use, intent, and purpose that the said *Elizabeth Davies* and her assigns should, in case she survived the said *S. Davies*, receive and enjoy by and out of the said hereditaments thereinbefore conveyed, (as a fund additional to a certain estate already charged with a like annuity in her favour during her natural life,) the annual sum or rent charge of 300*l.*; with powers of entry and distress, and perception of the rents and profits, for the better securing the due and regular payment of the annuity, and subject thereto to the use of the said *Lawrence Norcop*, his executors, administrators, and assigns, for the term of 500 years thence next ensuing, upon the trusts therein mentioned; remainder to the use of said *P. Davies*, and the heirs male of his body lawfully issuing; remainder to use of *C. Dundas*, the only other son of the said *S. Davies*, and the

1820.

JERVIS *against* TAYLEUR.

the heirs male of his body lawfully issuing; remainder to the use of the said *S. Davies*, his heirs and assigns, for ever. A commission under the great seal of the 12th *January*, 1809, was awarded and issued against the said *S. Davies* and *P. Davies*, directed to certain commissioners therein named; and the major part of the commissioners duly found that the said *S. Davies* and *P. Davies* did become bankrupts, within the meaning of the several statutes then in force concerning bankrupts, and Sir *Matthew Bloxam*, *Henry Z. Jervis*, and *George Downward*, were duly chosen assignees of the estate and effects of the bankrupts. By bargain and sale of the 14th of *February*, 1809 (enrolled in his Majesty's High Court of Chancery, the 6th *May*, 1809), and made between the commissioners of the one part, and the assignees of the other part, the said commissioners did grant, bargain, &c. unto the said assignees, their heirs and assigns, all the said bankrupt's messuages, lands, tenements, and hereditaments, whereof or wherein and whereto they, the said *Samuel Davies* and *Peter Davies*, or either of them, at the time they became bankrupts, had any estate, right, title, interest, possession, remainder, reversion, expectancy, or otherwise, and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; to hold the same unto and to the use of the said assignees, their heirs and assigns, for ever; or, according to the said *S. Davies*' and *P. Davies*' right and interest therein respectively, subject to such mortgages and other charges and incumbrances which the same premises were subject to; in trust nevertheless, for all the creditors of the said *S. Davies* and *P. Davies* who had already sought, or should thereafter come in and seek

relief,

relief, by virtue of the said commission, against the said *S. Davies* and *P. Davies*; and as to the overplus of any, after payment and satisfaction of all such debts, and the costs of suing forth and prosecuting the said commission, in trust for the said *S. Davies* and *P. Davies*, their heirs and assigns. The settled estate has been sold by the assignees of the bankrupts, and they have filed a bill against the purchaser for a specific performance of the contract for sale; and upon the hearing of the cause, the Lord Chancellor directed this case to be sent to the Court of King's Bench, for the opinion of the Judges of that Court, and that the question should be, what estate and interest the said Sir *M. Bloxam*, *H. J. Jervis*, and *G. Downward*, took in the estate settled by the indentures of the 8th and 9th *November*, 1803, by force of the bankruptcy of *S. Davies* and *P. Davies*, and the indenture of bargain and sale of the 14th *February*, 1809. The cause was argued at the sittings at *Serjeants' Inn*, before last *Michaelmas* term, by

Sugden, for the plaintiff. The question in this case is, whether a bargain and sale under a joint commission of bankruptcy, against the tenant for life and tenant in tail, bars the remainders over, or only conveys an estate for life with a base fee? It is clear, that by joining in a recovery the tenant for life and the tenant in tail might have barred the remainders; and by the 21 *J.* 1. *c.* 19. *s.* 12. it is enacted, "That the commissioners shall have power to grant and convey, &c. any lands, &c. whereof any bankrupt is or shall be in any ways seised of any estate, in tail, in possession, reversion, or remainder, and whereof no reversion or remainder is or shall be in the king's majesty, his heirs and successors, of

1820.

JERVIS *against* TAYLEUR.

of the gift or provision of his Majesty, to any person, for the relief and benefit of the creditors of all such bankrupts; and that all such grants, &c. shall be good against the said bankrupts, and against the issues of the body of such bankrupts, and against all persons claiming any estate, right, title, or interest, by, from, or under the said bankrupts, after such time as such person shall become bankrupt, and against all persons whatsoever whom the said bankrupt, by *common recovery or other means*, might cut off or debar from any *remainder, reversion*, &c." This statute was passed for the purpose of extending the provisions of former statutes in favour of the creditors; and the preamble expressly enacts, that it shall be construed largely and liberally for the relief of creditors. The object was to enable the commissioners to do, with respect to real property, whatever the bankrupt himself could have done; and here the two bankrupts might, by joining in a common recovery, have barred the remainder; and if so, the remainder in this case is barred by the operation of the statute.

Preston, contrà. The several bankrupt acts are to be considered as parts of the same system: they operate against the bankrupt's property, either by way of forfeiture or alienation. It is the act of bankruptcy which operates as the alienation of the estate; for the bargain and sale is the mere execution of an authority by the commissioners. [*Bayley* J. The estate remains in the bankrupt till the commissioners execute the assignment.] The Court must look to the nature of the act which the bankrupt has done: he is considered, in point of law, as having committed a crime; and is, in many instances, subjected to a prosecution for felony, from circumstances

arising

arising out of his bankruptcy. The statute of 34 & 35 *H.* 8. *c.* 4. did not enable bankrupts tenants in tail to bar even their own issue; and under the statute 17 *Eliz. c.* 7. the interest of the bankrupt alone could pass. Then came the statute 21 *Jac.* 1. *c.* 19. *s.* 12. which enabled the commissioners to convey all lands whereof the bankrupt is, or shall be, in any way seised of any estate, in tail, in possession, reversion, or remainder, and whereof no reversion or remainder shall be in the king's majesty, his heirs or successors, to any person or persons, for the relief and benefit of the creditors of all such bankrupts; and it enacts, that all and every such conveyances, &c. shall be good against the bankrupts, and against the issues of the bodies of such bankrupts, and against all persons claiming any estate, &c. by, from, or under the bankrupts, after such time as such person shall become bankrupt, and against all persons whatsoever whom the bankrupt, by *common recovery or other ways and means*, might cut off or debar from any *remainder, reversion*, &c. &c. Then, by construction, there is an exception in favour of the crown, since the remainder or reversion in the king could not be barred. The object of the legislature was to do no more by means of an act of bankruptcy than could be done by a common recovery. The word "bankrupts" is to be taken distributively, and "reddendo singula singulis" is applicable to the extent of interest and power of alienation of each individual being bankrupt. There might have been several commissions against the father and son, or, as the fact is, a joint commission against both. Now, the statute does not contain any express legislative direction, as to *two* persons being partners and becoming bankrupts. A tenant in tail in remain-

1820.

JERVIS *against* TAYLEUR.

remainder may bar his issue by fine, but he cannot alien so as to bar the remainder or reversion expectant on his estate. If there had been a separate commission against the tenant for life, and another commission against the tenant in tail, the assignees of the former would have had a life estate, and the assignees of the latter would have had a base fee; and if that be so, the circumstance of the tenant for life and the tenant in tail being in partnership, cannot give to the act of bankruptcy of the tenant in tail a greater effect than if they were separate traders. Supposing them to be in partnership, the act of the creditor in taking out a separate instead of a joint commission, or the act of the commissioners in making one bargain and sale of the property of both the traders, instead of a bargain and sale of the property of each trader distinctly, cannot vary the effect of the act of bankruptcy. A separate commission against the tenant in tail would not operate as an alienation of the fee simple. Two persons cannot commit one joint crime, or one joint act of bankruptcy: the act and the crime of each is distinct, so must therefore be the alienation. The tenant for life and remainder man in tail must concur in the act of alienation, by way of common recovery, to pass a fee simple, and consequently to bar the remainder and the reversion. This is not a joint alienation of two bankrupts, but operates as two separate conveyances: the acts of each are separate, and the assets of each are separate. [*Abbott* C. J. Suppose the tenant for life should convey his estate to the tenant in tail.] Then the estate for life merges in the estate tail, or the base fee derived from the estate tail; but till the merger has taken place (and in this instance it had not taken place prior to the bargain and sale, or the bankruptcy,) there was not any right or power

in

in the tenant in tail alone to alien the fee simple. If there were a common recovery making the father tenant and the son vouchee, then the title to the fee simple would have been perfect: in that case, there would have been the concurrence of all the persons capable of conveying. Suppose *A.*, the father, tenant for life, *B.*, the son, tenant in tail, and *A.*, tenant in fee expectant, and a joint commission of bankruptcy issues against both, the reversion in fee expectant would not be assets at law, although it would be transferable and devisable; but supposing, in the interval, the tenant in tail were to die without issue, whose assignees would be entitled to the estate? It would be assets of the father, by reason of the fee, and not those of the son. If the value of the life estate belongs to the father's creditors, the value of the estate tail belongs to the son's creditors, and his separate creditors would be preferred, even under a joint-commission, to the partnership creditors. The effect of the argument on the other side would be to give to the son's creditors an estate in fee. For the creditors of the father could be entitled to his life estate only. But why, in the case of a partnership, is an act of bankruptcy by a son, being tenant in tail and a partner with his father, to give to the son's separate creditors a larger estate or benefit than they would have taken if he had not been a partner, or had been a partner with any other person than his father, the tenant for life? The stat. 21 *Jac.* 1. *c.* 19. only enables the assignees to do what the bankrupts individually could do by conveyance, fine, or recovery. In the case of a power of appointment by tenant in tail, the commissioners cannot execute that power. Suppose an estate to *A.* for life, and to *B.* in tail, with power to alienate when in possession, his bankruptcy when tenant in remainder would not operate

1820.

JERVIS *against* TAYLEUR.

operate as an alienation. The attainder of tenant in tail in remainder bars his issue; but the reversion remains unaffected. Now, would the attainder of a father tenant for life, and of his son tenant in tail, bar either the remainder or the reversion? Undoubtedly it would not, but only forfeit the respective estates of the father and the son. [*Bayley* J. The statutes of forfeiture are construed strictly; but the statutes of bankruptcy liberally.] The general principles of law are the best guides to follow; and, adopting them, the assignees take only an estate for life, with a base fee, by virtue of the estate tail of the son; and this is all the legislature intended the creditors should have. Bankruptcy was not intended to enlarge the power of tenant in tail. The instance of a bankruptcy by a father tenant for life, with remainder to his son in tail, and a partnership between them, and a joint commission against them, was never contemplated by the legislature. The acts and power of each respective owner becoming bankrupt, were alone the object of parliament in giving to creditors the benefit of the ownership of the estates tail of bankrupts.

Sugden, in reply. The effect of the act of bankruptcy is to transfer, by the operation of this statute, every thing which the bankrupt was capable of transferring by proper legal conveyance. The effect of the argument on the other side is, to invest as small an estate as possible in the assignees. The object of the legislature, on the other hand, was to give to the creditors the largest possible estate which the bankrupts could convey, without prejudicing the rights of others: here, without injuring others, they might both have suffered a recovery, and conveyed the fee-simple. The argu-

1820.

JERVIS *against* TAYLEUR.

argument on the other side proceeds upon extreme legal niceties; for it is admitted, that if the tenant in tail had conveyed to the tenant for life, and he had afterwards become bankrupt, the remainder-man would have been barred; and, if so, inasmuch as by the operation of this statute the estates for life and in tail had become united in the same persons, the one is merged in the other, and the assignees have acquired the same power over it which the tenant in tail, by a conveyance before the bankruptcy, would have acquired.

ABBOTT C. J. If the son alone had been a bankrupt, the commissioners, by the deed of bargain and sale, could only have conveyed a base fee; but both the father and son having become bankrupts, the commissioners have acquired a power over each estate. It seems to me, however, that the execution of the power must operate separately on each estate, and that when executed it cannot do more than convey an estate for life, and a base fee. We will send our certificate.

The following certificate was afterwards sent:

THIS case has been argued before us by counsel, and we are of opinion that Sir *Matthew Bloxam*, *Henry Z. Jervis*, and *George Downward*, took an estate for the life of *Samuel Davies*, and a base fee in remainder, determinable on the death of *Peter Davies*, and failure of heirs male of his body.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

1820.

Monday, May 8th.

The KING *against* HENRY HUNT, JOHN KNIGHT, JOSEPH JOHNSON, JOHN THACKER SAXTON, JAMES MOORHOUSE, JOSEPH HEALY, SAMUEL BAMFORD, ROBERT JONES, GEORGE SWIFT, and ROBERT WILD.

Upon an indictment against *A. B.* and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held, (*A. B.* having presided at this meeting,) that resolutions passed at a former meeting asembled a short time before, in a distant place, and at which *A. B.* also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to shew the intention of *A. B.* in assembling and attending the meeting in question.

A copy of these resolutions, delivered by *A. B.* to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, is admissible without producing the original.

Large bodies of men having come to this meeting from a distance, marching in regular order, resembling a military march, it was held to be admissible evidence to shew the character and intention of the meeting, that within two days of the same, considerable numbers were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting; and that on their discovering the persons who saw them, they ill treated them, and forced one of them to take an oath never to be a king's man again: Held, also, that it was admissible to shew in evidence, for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill treated, expressed their disapprobation of his conduct by hissing.

Parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible, without producing the originals.

Upon such an indictment, evidence of the supposed misconduct of those who dispersed the meeting is not admissible.

THIS was an indictment against the defendants, and the first count stated, that the defendants, being malicious, seditious, and ill-disposed persons, and intending to disturb the peace and common tranquillity of the realm, and to excite discontent and disaffection, and to excite the subjects of our lord the king, to hatred of the government and constitution, on the 1st of *July*, and on divers other days and times, at *Manchester*, did conspire together, with divers other persons unknown, unlawfully to meet together, and to cause a great number of other persons to meet with them at a certain place in the said county, for the purpose of disturbing the peace, &c., and for the purpose of exciting discontent, &c, and for the purpose of exciting the subjects to hatred, &c. And that defendants, and said other conspirators, in pursuance of said conspiracy, on 16th *August*, at

Man-

Manchester, unlawfully did meet together, and did cause, aid, and assist in causing divers subjects to a large number, to wit, sixty thousand and more, unlawfully to meet together for the purposes aforesaid, at a certain place in the said county, in a formidable and menacing manner, and in military array, with clubs, sticks, and other offensive weapons, and with divers seditious ensigns, and with flags, banners, and placards, bearing divers seditious inscriptions and devices. To the great terror of the subjects, to the evil example, &c., and against the peace, &c. The second and third counts were also for a conspiracy. Fourth count; that defendants being such persons, &c., unlawfully did meet together, with divers other persons unknown, to a large number, to wit, sixty thousand, for the purpose of exciting discontent and disaffection, and for the purpose of exciting the subjects to hatred of the government and constitution, in contempt, &c. There was a count for a riot. Plea, not guilty.

At the trial before Bayley J., at the last assizes for the county of *York*, it appeared, that on the 21st *July*, 1819, the defendant, *Hunt*, had presided at a meeting in *Smithfield*, one of the chief objects of which was, to consider the means of obtaining a reform in parliament. At that meeting, resolutions of a seditious tendency were passed, the defendant, *Hunt*, having put the resolutions from the chair. On the 31st *July*, a notice of a meeting, the notice being dated the 23d *July*, and purporting to be signed by eleven persons, inhabitants of *Manchester*, appeared in a newspaper at *Manchester*, by which the public were informed, that a meeting would be held on the 9th *August*, on the area near *St. Peter's* Church, to take into consideration the most speedy and effectual

1820.

The KING against HUNT.

mode of obtaining "a radical reform in the Commons house of parliament, and also to consider the propriety of the unrepresented inhabitants of *Manchester* electing a person to represent them in parliament." And it announced, that *H. Hunt*, Esq. was to be in the chair. The magistrates having given notice that this meeting was illegal, another notice, purporting to be signed by the same persons, appeared in the same paper, stating, that they had been advised that a meeting, for the purpose of electing a person to represent the inhabitants of *Manchester* in parliament was illegal, and that such meeting would not therefore be held. In the same paper, however, a notice appeared, dated the 6th *August*, "that a public meeting would be held on the area, near *St. Peter's* Church, on *Monday*, the 16th, to consider the propriety of adopting the most legal and effectual means of obtaining a reform in the Commons house of parliament, the chair to be taken by the defendant, *Hunt*, at 12 o'clock. In pursuance of this last notice, the meeting assembled on the 16th, and the defendant, *Hunt*, appeared upon the hustings, but before any resolutions were proposed, the meeting was dispersed, and the defendant, *Hunt*, and others, were taken into custody. On behalf of the prosecution, the resolutions passed at *Smithfield* were given in evidence, and the tenor of them was proved by a copy produced by a witness, to whom that copy had been delivered by the defendant, *Hunt*, at the time of the *Smithfield* meeting, as the resolutions intended to be there proposed. The witness also swore, that the resolutions he heard read, corresponded with the copy so delivered to him. It was objected, by the defendants, that this was not sufficient evidence of the tenor of the resolution, inasmuch as the

ori-

original paper from which they were read, ought to have been produced, or the defendants ought to have had notice, at least, to produce it, in order to let in the secondary evidence; and secondly, that the resolutions themselves were not admissible at all, inasmuch as there was no evidence to shew, that it was intended to propose the same resolutions at the meeting at *Manchester*. The learned Judge over-ruled the objections, and received the evidence. It appeared also that large bodies of persons, who attended the meeting at *Manchester*, on the 16th, came from a distance, organized, and with a regularity of step and movement, resembling that of a military march, and that one of these bodies came from the neighbourhood of a place called *White Moss*, and evidence was given, that, on the 14th *August*, a witness had seen at *White Moss*, before day-break, a number of persons assembled, practising the marching step, and that these persons, upon seeing the witnesses, had ill-treated them, and called them spies, and extorted from one of them an oath, never to be a king's man again, or to name the name of a king. And it was proved, that some of the parties who entered *Manchester*, on the 16th, in military order, on passing the house of the witness, who had been so ill-treated, expressed their disapprobation of him by hissing. It was objected, by the defendants, that this was not admissible evidence against them, inasmuch as it did not appear that the meeting at *White Moss* took place with the knowledge or concurrence of any of them. The learned Judge over-ruled the objection, and received the evidence. It appeared, also, that at the meeting of the 16th, there were various flags and banners, containing inscriptions and devices, of a seditious and inflammatory tendency, and that these

1820.

The King *against* Hunt.

were seized by the police officers on the dispersion of the mob; these inscriptions and devices were described by the several witnesses, from memory. It was objected, by the defendants, that the flags or banners ought to have been produced, or that, in order to entitle the prosecutors to give secondary evidence, the defendant ought to have had notice to produce the originals. The defendants also tendered evidence to prove, that various acts of outrage were committed upon the people assembled, by the military, on the dispersion of the meeting. The learned Judge refused to receive this evidence. The trial occupied ten days at *York*, and the defendants, *Hunt*, *Knight*, *Bamford*, *Healy*, and *Johnson* were found guilty, upon the fourth count of the indictment. The other defendants were acquitted, and application having been made for a new trial, after the reading of the evidence, which occupied the time of the Court for several days in this term, the defendant, *Hunt*, on behalf of himself and the others, contended, that there ought to be a new trial, on the ground that improper evidence had been received against him, and that evidence tendered on the part of the defendants at the trial had been refused, and he renewed the objections made at the trial; and he further urged, that the learned Judge had misdirected the jury as to the effect of the evidence.

Cur. adv. vult.

Abbott C. J. Although this matter has occupied a considerable portion of that time and attention which is dedicated to the administration of justice, it has not presented to my mind any doubt whatever; and I will deliver my opinion upon the several points with as much brevity

brevity as possible. The first objection taken by the defendants was, as to the rejection of the proposed evidence of the misconduct of the military. This supposed misconduct took place at the dispersion of the assembly, and was, in my opinion, irrelevant to the matters in issue. The matters in issue were the intention and object of the assembly, and, upon the count for a riot, the conduct of the persons assembled prior to their dispersion. Now the conduct of those who dispersed the assembly, could have no bearing upon the intention and object of the assembly, because those must have existed before the dispersion, and were, in their nature, perfectly distinct from the conduct of those who afterwards dispersed the assembly. Neither was the conduct of the dispersers relevant to the demeanour of those who had previously assembled; and nothing that was properly applicable to shew the demeanour of the persons assembled was rejected. On the contrary, witness after witness was called and heard, to speak to the propriety of their demeanour, up to and at the time of the arrival of the military among them; and up to and at the period spoken to by one of the witnesses examined for the prosecution, who gave his opinion and reasons for sending in first the yeomanry, and afterwards the regular cavalry. No witness was rejected who was offered to speak to facts, contradictory to the matters deposed to by that person, or by any other witness examined for the prosecution. It appears to me, therefore, that the proposed evidence relating to the conduct of other persons in a matter subsequent, was properly rejected. But if this were more doubtful than it appears to me to be, with reference to the whole charge originally preferred against the defendants, still that doubt would be altogether removed by

1820.

The King against Hunt.

the verdict, which having narrowed the offence of the defendants to the fourth count, which charges an unlawful assembly, for the purpose of exciting discontent and disaffection, and does not charge any actual or intended violence, has, in my opinion, unquestionably rendered the proposed evidence irrelevant, as having no bearing upon that charge. The second point of objection is, to the admission of the resolutions of the *Smithfield* meeting. The objection here is two-fold: first, that the best evidence was not produced; and, secondly, that no evidence of them was admissible. Now the paper produced was proved to have been received from the hands of one of the present defendants, at the time and place of passing the resolutions, as containing the very resolutions then actually in progress, and then in the act of being passed by or proposed to the persons assembled, and as against the party to whom this proof applied, the paper produced was as good, if not better evidence than any other could have been. On the second part of the objection, it is to be observed, that these resolutions were proposed at a large assembly, very recently held for some alleged purpose of parliamentary reform, which was the avowed purpose of the meeting at *Manchester*, at which previous assembly, one of the defendants had presided, and put the question (if, indeed, any question can be deemed to be effectively propounded on such an occasion) which defendant, a stranger in point of residence or other than political connection with *Manchester* or its vicinity, was announced as the invited chairman, and actually became the chairman at the meeting in question. Under such circumstances, upon the question of intention, I have no doubt that it was competent to shew, as against that individual, that, at a similar

meet-

1820.

The KING *against* HUNT.

meeting, held for an object professedly similar, such matters had passed under his immediate auspices. I have no doubt of the competency of such evidence; its effect was for the consideration of the jury, and was properly left to them. It was, in its nature, a declaration, by that defendant, of his own sentiments and views, with reference to what is called Parliamentary Reform, and to the assembling of large numbers of persons to hear speeeches and resolutions under that pretext. The third objection was to the reception of that evidence which regarded the training at *White Moss*, and the assault there committed. The case submitted to the jury by the present indictment, presented two questions. First, the general character of the assembly: as in all cases of conspiracy, or other unlawful acts in which many persons are concerned. And, secondly, the particular case of each individual charged, as connected with the general character, supposing the general character to be such as that its criminality might in the result be a fit matter for the consideration of the jury. Now it was shewn that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies to a certain extent arranged and organized, and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say that they were left to the consideration of the jury in a manner less favourable to the defendants than the evidence warranted. And if this appearance was in itself proper for the consideration of the jury, it must

have

1820.

The KING against HUNT.

have been proper to shew to them that at the very place from which one of these bodies came, a number of persons had assembled before day-break, and had been formed and instructed to march as soon as there was light enough for such an operation; and that some of the persons thus assembled had grossly ill-treated two others, whom they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a king's man again, or to name the name of a king: and that another of the bodies that went to the ploce of meeting, expressed their hatred toward this person by hissing as they passed his door. These matters were, in my opinion, unquestionably competent evidence upon the general character and intention of the meeting. Their effect as to each particular defendant was, as I have already observed, a distinct matter for the consideration of the jury. With respect to the last point, the reception of the evidence as to the inscriptions on the flags or banners, I think it was not necessary either to produce the flags or to give notice to the defendants to produce them. The cases requiring the production of a writing itself will be found to apply to writings of a very different character. There is no authority to shew that in a criminal case ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendants. And in many instances the proof of such matters from eye-witnesses, speaking to what they saw on the occasion, has been received, and its competency was never, to my knowledge, called in question until the present time. Inscriptions used on such occasions are the public expression of

1820.

The King against Hunt.

of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the colour of the banner, or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its colour. And if such parol proof may be received generally, the proof at this trial was properly received: notwithstanding the allegation that the things themselves, or some of them, were in the hands of a constable then at *York*; for, in the first place, this fact did not appear (if indeed it appeared at any time distinctly) until after the evidence was received; and, in the second place, if it had appeared distinctly at the time when the parol evidence was offered, still that particular fact would not affect the competency of the other proof, such other proof being competent upon general principles. Its proper effect would only be to furnish matter of observation to the jury on the part of the defendants, that the prosecutor chose to offer only the fallible testimony of witnesses where he had it in his power to produce the infallible testimony of the things themselves. Although, however, for the purpose of the present objection, it is assumed that some of the banners actually displayed in *Saint Peter's Fields* were in the hands of a constable at *York*, yet if, instead of offering the parol evidence, that person had been called as a witness to produce them, the prosecutor might have been further required to prove that the things produced were the things displayed, and might have been required to deduce them

from

1820.

The King *against* Hunt.

from hand to hand; and if there had been a failure in any one step, the thing must have been rejected, supposing its production to be the only proof. The difficulty of such a deduction, and the impossibility that must occur in many cases, of either producing the things themselves, or of shewing what has become of them, shews the unreasonableness of requiring the proof of the things themselves, and of rejecting the testimony of eye-witnesses in a matter of public exhibition on an occasion like the present. The evidence of these banners and inscriptions was properly admissible to shew the general character and intention of the assembly; their application to the particular defendants was matter for the consideration of the jury, and was left to the jury in that way. Having disposed of these objections as matters of law, I shall take no further notice of the observations addressed to us upon what has been called misdirection in the effect given to this or that particular point, either of proof adduced or of proof supposed to be deficient, than to say generally, that it appears to me that no observation was made to the jury unsuitable to the matter to which it was applied; that the whole effect of the evidence was most properly left to them, and that they were not desired or directed to draw, nor have in fact drawn, any presumption or conclusion against the defendants, which was not well warranted by the evidence adduced against them.

Bayley, Holroyd, and Best, Justices, concurred.

Rule refused.

1820.

DUFF *against* CAMPBELL.

Monday, May 8th.

In an action against a member of parliament, two persons became sureties in a bond, conditioned for the payment of such sum as should be recovered with costs. The cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt. Having suffered a term to elapse after obtaining his certificate without pleading it, the Court refused to let him plead it, as of the former term, except on condition of dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client.

A RULE nisi having been obtained, calling upon the plaintiff to shew cause why the defendant should not be at liberty to plead his certificate of bankruptcy, as of last *Michaelmas* term, nunc pro tunc. It appeared on the 6th *October*, 1818, that an action upon two bills of exchange was commenced against the defendant, then a member of parliament, by serving him with a copy of a writ of summons, and a notice of an affidavit of debt; and that pursuant to such notice, two persons named in the affidavits became sureties for the defendant in the cause in a bond, in the sum of 1700*l.*, conditioned for the payment by the defendant of *such sum as should be recovered*, together with costs. In *Michaelmas* term, 1818, a declaration was delivered; and in *Hilary* term, 1819, the defendant pleaded the general issue; and on *February* 5th, 1819, notice of trial was given for the sittings at *Guildhall*, after that term. The defendant then filed his bill in the Exchequer against the plaintiffs, for discovery and relief touching the bills which were the subject of the action; and on the 11th *February*, 1819, an injunction was granted, which was not dissolved until the 6th *February*, 1820. On the 15th *April*, 1819, a commission of bankruptcy was issued against the defendant, under which he was duly declared a bankrupt; and on the 15th *July*, 1819, he obtained his certificate, and he then instructed his attorney to plead the same in this action, puis darrein continuance, in consequence of which the plea was prepared; but his attorney was deterred from filing it by the

1820. the opinion of his counsel in equity, who advised that it would have the effect of dissolving the injunction, or amount to a waiver.

Duff *against* Campbell.

Gaselee and *Chitty* shewed cause. The defendant, after having delayed the plaintiff by a bill in equity, now applies for leave to plead the certificate, which would be a bar to recovery altogether, as of *Michaelmas* term. This is similar to a case of bail in error; and in *Southcote* v. *Braithwaite* (a), it was held, that as bail in error could not surrender the principal, they were not entitled to relief, although the principal became a bankrupt pending the writ of error. By analogy, the Court ought not to grant any indulgence in this case, as the the sureties could not in this case surrender their principal.

Marryat and *Campbell*, contrà. If the defendant be not at liberty to plead his certificate, he will be liable to the sureties. It is not pretended that this is a debt, which would not be discharged by the certificate, nor that the bill in equity was vexatious or oppressive. He will be liable, therefore, for the debt, although the legislature clearly intended that the certificate should be a discharge; and they cited *Capper* v. *Stewart*, *Tidd. Prac.* 891. and 2 *Smith's Reports*, there referred to.

Abbott C. J. The single question is, whether the Court ought to interfere to relieve a person who has filed a bill in equity, in which, if he were now to succeed, he would defeat the claim altogether; and if he

(a) 1 *T. R.* 624.

fails,

fails, he, an insolvent person, will, at all events, charge the plaintiff with some costs. If it had not been for that suit, the plaintiff would have had judgment in *Easter* term, before the bankruptcy. The Court will not relieve in such a case, unless on the terms of the defendant's dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client.

Rule absolute, on these terms.

The KING *against* PEACE.

Monday, May 8th.

Upon an indictment for an assault upon *E. E.* it is sufficient to prove that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, *E. E.* the elder and *E. E.* the younger.

THE defendant was indicted for an assault and battery, stated on the record to have been upon the person of *Elizabeth Edwards*. Plea, not guilty. At the trial at the last Spring assizes for the county of *Hereford*, before *Holroyd* J., it appeared, that there were two persons, a mother and a daughter, both of the name of *E. E.*, and that, in point of fact, the assault had been committed on the daughter. It was objected, at the trial, that this proof varied from the indictment, inasmuch as *E. E.* must be presumed to be *E. E.* the elder. The objection was over-ruled, and the defendant convicted; and now, the defendant being brought up for judgment

W. E. Taunton renewed his objection. In *Lepiot* v. *Brown* (a) it was held, that if father and son are both called *A. B.* by naming *A. B.*, the father primâ facie

(a) 1 *Salk.* 7.

shall

1820.

The King *against* Peace.

shall be intended. So in *Wilson* v. *Stubs* (a) the Court said, that one being named *Ralph Stubs*, without addition, should never be accounted the younger, but the elder of the two of that name. Here the objection is, to the description of the prosecutrix, the person against whom the offence has been committed. There are two persons bearing the name of *Elizabeth Edwards*, and the person, therefore, in the indictment, must be taken to be the elder. And he cited *Hawkins's Pleas of the Crown*, vol. 3. tit. *Appeals*, s. 106., and *Vin. Abr.* vol. 14. tit. *Indictment*, n. 15, 16, 17.

Per Curiam. The crime charged in the indictment has been proved. For it is stated, that the defendant committed an assault on *Elizabeth Edwards*, and that has been proved. It is not absolutely necessary that the indictment should specifically describe the individual on whom the assault was, for otherwise, an indictment would be bad, which charged that the assault was committed on a person to the jurors unknown. The question here is, not whether the party assaulted has been rightly described, but who the party is who is described in the indictment as having been assaulted. Here that has been sufficiently proved. The objection, therefore, is not sustainable.

Judgment for the Crown.

(a) *Hob.* 330.

The KING *against* The Justices of HEREFORDSHIRE.

Tuesday, May 9th.

By 49 *G.* 3. *c.* 68. *s.* 5., ten clear days' notice of the intention to appeal is required. Held, that the ten days are to be taken exclusively, both of the day of serving the notice and the day of holding the sessions.

ONE *Joseph Stinton*, having had an order of filiation made on him, as the father of a bastard child, served a notice of appeal to the quarter sessions for the county of *Hereford*, on the morning of the 9th of *October*. The sessions were holden on the 19th of the the same month; and the Court refused to enter on the appeal, being of opinion that the notice was insufficient, the statute 49 *G.* 3. *c.* 68. *s.* 5. requiring that the person aggrieved by such an order should give notice ten clear days before the quarter sessions, of his intention to appeal, and the cause and matter thereof. *W. E. Taunton* having obtained a rule nisi for a mandamus to the Justices to receive the appeal,

Abraham now shewed cause against it, and relied on the words of the statute, which could only be satisfied by a notice wherein there should be ten clear days, exclusive of the day of serving it and the day of holding the sessions.

W. E. Taunton, contrà, contended that the word "clear" meant only complete days; and referred to the computation of the octave of *Saint Hilary*, and the quarto die post of the term, to shew that the days of a stated period were in law generally reckoned both inclusively, and that all that the legislature had in view, in this instance, was to prevent such a computation

1820.

The KING *against* The Justices of HEREFORDSHIRE.

being used. But the Court were of opinion, that ten clear days meant ten perfect intervening days between the act done and the first day of the sessions, and held, therefore, that the notice was defective; and they referred to *Roberts* v. *Stacey*. (*a*).

Rule discharged.

(*a*) 13 *East*, 21.

Wednesday, May 10th.

The KING *against* WILLIAMSON and Another.

Where only circumstances of strong suspicion are stated in affidavits, on which a rule for a criminal information is moved, it is not sufficient unless the deponents also add their belief that the party against whom the application is made acted from corrupt motives.

J. WILLIAMS moved for a rule nisi, for a criminal information against the two defendants, who were the mayor and the town clerk of the city of *Chester*, for corruption at the last election for members of parliament for that city. It appeared, from the affidavits filed, that it had heretofore been the practice of the corporation, to admit persons who were entitled to their freedom, as freemen, during the election; that the mayor, on this occasion, made several frivolous excuses, and, finally, refused to comply with this practice; and that the town clerk stated, that the mayor acted under his advice and direction, and that he had no time then to examine the papers and necessary documents, which was not true; that both of them had taken an active part for the successful candidate, General *Grosvenor*, during the election; the mayor having himself proposed him as a candidate, and appropriated the exchange rooms (of which he had the disposal as mayor) to be a committee-room for the *Grosvenor* party; and that the numbers being for General *Grosvenor* 698, and for Sir *John Grey Egerton* 680, the numbers of the new freemen, whom

 he

1820.

The KING *against* WILLIAMSON.

he refused to admit, were for General *Grosvenor* six, and for Sir *J. G. Egerton*, 44. It also appeared, that since the election, the mayor had admitted 29 out of the 44, which would have given a majority to the losing candidate. The affidavits, however, did not state, that, in the apprehension and to the belief of the deponents, the defendants had acted from corrupt motives: and he contended, that this was not necessary, it being apparent, from the facts themselves, what the motives must have been. He referred, as to the merits of the case, to *Rex* v. *Borron* (*a*), in which it is laid down, that fear and favour are included amongst those dishonest and corrupt motives, for which this Court will grant a criminal information.

HOLROYD J. Unless the deponents add to these affidavits, their belief that these parties acted from corrupt motives, the rule cannot be granted. There must either be such circumstances as can, by possibility, lead but to one conclusion, or there must be, if only suspicious circumstances be stated, the apprehension and belief of the party applying, that improper motives operated on the defendants. Here, the circumstances are not, per se, strong enough, and the affidavits must, therefore, be amended in this particular before the Court can grant a rule.

BEST J. concurred. (*a*)

Rule refused.

The affidavits having been amended, a rule nisi was afterwards obtained.

(*a*) *Ante*, 434.
(*b*) *Abbott* C. J. and *Bayley* J. had left the Court.

1820.

Wednesday, May 10th.

The KING *against* The Inhabitants of ARNESBY.

A father has, at the common law, no authority to bind his infant son apprentice without his assent; and consequently, where an indenture of apprenticeship was executed by the master and the father of the apprentice, but not also by the apprentice himself: Held, that it was invalid, and that no settlement could be gained under it.

SAMUEL *Simcoe* was removed, by an order of two justices, from *Arnesby*, in the county of *Leicester*, to *Abthorpe*, in the county of *Northampton*. On appeal against this order, it appeared, that the pauper had served some years, under an indenture of apprenticeship in *Abthorpe*. The indenture stated, that *Samuel Simcoe*, son of *Samuel Simcoe*, of *Kettering*, in the county of *Northampton*, glover, by and with the consent of his said father, did put himself apprentice to *William Sheppard* of *Abthorpe*, in the county of *Northampton*, framework knitter, to learn his art, and with him, after the manner of an apprentice to serve, from the 10th day of *May*, 1802, unto the full end and term of seven years, from thence next following to be fully complete and ended. It was, in all respects, regular, except that it was executed only by the father of the pauper and the master, and not by the pauper himself. The sessions thought the indenture invalid, and quashed the order of removal.

Clarke, *Phillipps*, and *Dwarris*, in support of the order of sessions, after citing *Rex* v. *Cromford* (a), were stopped by the Court.

Marriott and *Francklin*, contrà. In the case cited, there was no contract for the apprentice to serve his master, so that it would not have been a valid indenture, even if it had been executed by the son; and upon that, Lord *Ellenborough* founds his judgment in that case. Here, however, there is a contract to that

(a) 8 *East*, 25.

effect.

effect. Here, too, the apprentice has served under the indenture, and that is equivalent to an execution of it by him. In *Rex* v. *Houghton-le-Spring* (a) it was laid down, that if a master, knowing the terms by which a servant is bound, accept his service, the agreement must be considered as binding on him, although he has not executed the deed; and *Co. Litt.* 230. b. note 1., is to the same effect. But, secondly, here the father has executed the deed, and that is enough; for it is laid down, 4 *Com. Dig.* tit. *Justices of the Peace*, B. 55., that a father may, at the common law, bind his infant son apprentice. Then if so, this was a valid binding of the son by the father, and the son has assented to it, by serving under the indenture.

ABBOTT C. J. The words of the statute of the 3 *W.* & *M.* *c.* 11., are, "that if any person shall be bound an apprentice, by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." Before, therefore, any settlement can be gained, the Court must see, that the party is bound by indenture. Now the ordinary mode is, for a party to bind himself, by executing the indenture. Even, if he does not do that, still, in the special case of a parish apprentice, he may be bound without such execution: but then the binding takes effect by the authority of an act of parliament. This, however, is not the case of a parish apprentice, and unless we were to hold, that it is competent for a father to bind his son apprentice without his assent (for which no authority can be produced) we must hold this in-

(a) 2 *B.* & *A.* 375.

1820.

The King *against* The Inhabitants of Arnesby.

denture to be invalid. The case of *Rex* v. *Houghton-le-Spring* is very different. That was a case of hiring and service, the statutes applicable to which say nothing of the mode in which the contract of hiring is to be made; and there it was held that the deed executed by the servant, and his employment under it, were evidence to shew the terms under which the hiring had been made. And I think that that decision was right. This case, however, stands upon very different grounds. I am, therefore, of opinion that the sessions formed a right judgment.

Bayley J. I am of the same opinion. An infant can only bind himself apprentice by deed, and the question in this case is, whether, according to the words of the act, this party is bound by indenture. The indenture, indeed, purports to bind the son, but the son has not executed it. It is said, however, that he has done that which is tantamount to an execution. If we were to hold that to be so, we should hold, contrary to all principle, that an infant might be bound by his act in pais, without executing the deed. In the case of a parish apprentice there is a special power given by the statute of *Elizabeth* to parish officers, and there an apprentice may be bound without his assent till he come of age. But a father has, at the common law, no such right. The passage cited from *Comyn's Digest* is unsupported by any authority. I think, therefore, that the indenture in the present case was invalid, and that no settlement was gained by the service under it.

Holroyd J. I am of the same opinion. The apprentice did not gain a settlement by the service in this

case;

1820.

The KING *against* The Inhabitants of ARNESBY.

case; for an infant cannot be bound merely by an act in pais. It has been argued, that as he has taken the benefit of the deed by serving under it, he must be bound by it. But that argument is not, as it seems to me, available. In *Rex* v. *Cromford* the apprentice had served out his time, and in *Rex* v. *Ripon* (a) the indenture was executed by the father of the apprentice and the master, with her consent, and she also served under it. Yet in both those cases the indentures were held to be invalid. According to my recollection the distinction is this: where a party takes the benefit of a deed, but does not execute it, he will not be liable under it as for a covenant broken, but he may be liable under the implied contract raised by the acts of benefit which he takes under it. Here the infant was not bound by indenture, and no settlement was gained.

BEST J. It seems to me that nothing has been said to shew that the infant was bound by this indenture. There is no sufficient authority for saying that a father, at the common law, can bind his infant son apprentice without his assent testified by the execution of the indenture. It is said, that the service here was tantamount to an execution; but where is that argument to stop? It might go the length of proving that a service for a single day, and that perhaps without proof of his knowledge of the contents of the indenture, would bind the apprentice. The dictum to which we have been referred applies only to land qui sentit commodum sentire debet et onus et transit terra cum onere; and even there it would be a difficult point to establish that where a

(a) 9 *East*, 295.

1820.

The King *against* The Inhabitants of Arnesby.

person took possession of the land for a single day, he was bound by all the covenants of a long lease, which he had never executed. It seems impossible to consider this as the case of a person bound by indenture; and unless that be so, he is not within the statute, and has gained no settlement.

Order of sessions confirmed. (*a*)

(*a*) See *Rex* v. *Badby*, 1 *Bott.* 549., where the point seems to have been taken for granted. And in *Rex* v. *St. Peter's on the Hill*, 2 *Bott.* 367., an indenture not executed by the master was held sufficient. In *Rex* v. *St. Nicholas, Nottingham*, 2 *T. R.* 726., although it was the case of a parish apprentice, yet the master, who had not executed the indenture, resided in another parish. In *Rex* v. *Ripon*, the binding was of an adult, and not of an infant.

Wednesday, May 10th.

The King *against* The Inhabitants of Castle Morton.

An agreement in writing, unstamped, for the letting a tenement at a certain rent, having been lost: Held, that parol evidence of its contents was not admissible, for the sake of proving thereby the value of the tenement.

SARAH Bedward, widow, and her two children, were removed, by order of two justices, from the parish of *Tewkesbury* in *Gloucestershire*, to the parish of *Castle Morton* in *Worcestershire*. On appeal, the sessions confirmed the order, and stated the following case for the opinion of this Court:

James Bedward, the husband of the pauper, being settled by hiring and service in *Castle Morton*, afterwards took a tenement in the parish of *Longdon*, in the county of *Worcester*, of one Miss *Poole*; the terms of the taking were contained in a written agreement, unstamped, which was lost. *James Bedward*, after residing on the tenement about half a year, gave Miss *Poole* 3*l.* to be off the bargain, and entered into a fresh agreement with

1820.

The King *against* The Inhabitants of Castle Morton.

Mr. *Penoent*, the landlord of Miss *Poole*, who accepted him as tenant in her stead. The appellants, to prove the value to have been 10*l.* or upwards, offered parol evidence of the contents of the unstamped agreement, which had been lost, in order to prove the amount of rent agreed for between *Bedward* and Miss *Poole*, which parol evidence the Court refused to admit.

Taunton, in support of the order of sessions, cited *Rippiner* v. *Wright* (*a*), as an authority in point.

G. R. Cross and *Bathurst*, contrà. It is not attempted in the present case to put the instrument itself in force: if it were so, the case cited would be decisive. It is only introduced in order to shew, not the agreement between the parties, but the value of the tenement. In *Dover* v. *Maestaer* (*b*), a promissory note was admitted in evidence for a collateral purpose, although not stamped. Here it was introduced for a collateral purpose only, and is in the nature rather of a declaration made by a party having competent knowledge as to the value.

Abbott C. J. The promissory note was there admitted in evidence, on the ground that the defendant, who had been in that case guilty of a crime, should not be allowed to relieve himself from the consequences of it by such an objection. And so in the case of forgery, a prisoner cannot object that the forged instrument, when produced, cannot be given in evidence for want of a proper stamp. But this case is very different; for the parties here seek to shew the value of a tenement by the

(*a*) 2 *B. & A.* 478. (*b*) 5 *Esp.* 92.

proof

1820.

The KING *against* The Inhabitants of CASTLE MORTON.

proof a contract previously entered into respecting it. The contract was not therefore, in this case, collateral, but of the very essence of the case. Nor can it be introduced as a declaration; for it is a declaration made under such circumstances as prevent its being admitted in evidence.

Order of sessions affirmed.

Thursday, May 11th.

The KING *against* The Mayor of TRURO.

By the charter of a borough it was directed, that when it should happen that any of the capital burgesses should die, dwell out of the borough, or for some cause be removed, it should be lawful for the remainder to elect others into the place of those so happening to die or be removed. Held, that these words were not so unambiguous as to warrant the Court in granting a mandamus to admit two persons, in the room of two non-resident capital burgesses; the corporation not having previously removed them for this cause from their offices.

SCARLETT, on a former day in this term, had obtained a rule nisi, calling upon the mayor and capital burgesses of *Truro*, to shew cause why a writ of mandamus should not issue, commanding them to proceed to the election and swearing in of two capital burgesses, in the room of *Edward* Lord *Exmouth* and *W. A. Boscawen*, Esq. It appeared upon the affidavits that the borough of *Truro* was an ancient borough, created by a charter of the 31st *Elizabeth*. The corporation consisted of a mayor and twenty-four capital burgesses, and the charter directed that as often as and whensoever it should happen that any one or more of the said capital burgesses for the time being should die, or *dwell out of the aforesaid borough*, or for some cause be removed from his office of capital burgess, that then and so often it might be lawful for the other capital burgesses of the borough, at that time surviving or remaining, or the greater part of them, of whom the mayor was to be one, to elect another or others of the burgesses of the borough into the places of the

said

said capital burgesses so happening to die or to be removed. It was also stated, that Lord *Exmouth* was elected a capital burgess in 1785, and Mr. *Boscawen* in 1789, and that neither of them, for the space of twenty years and upwards, had resided within the borough. 1820.

Carter appeared for the mayor and burgesses of the borough, and stated that he was ready to consent to any rule that the Court might make on the subject.

The affidavits on behalf of Lord *Exmouth* and Mr. *Boscawen* stated that they had never been amoved from the offices of capital burgesses, nor summoned to attend any meeting for the purpose of taking it into consideration. That the borough of *Truro* does not extend over the whole town of *Truro*, and that in particular a street called *Lemon-street*, in which several of the capital burgesses resided, was not within the borough.

Gaselee and *Littledale* now shewed cause. Non-residence does not ipso facto vacate the office, but an amotion by the corporation is previously necessary; *Rex* v. *Ponsonby* (*a*), and in that case *Rex* v. *Slade* is referred to, which was a point arising upon this very charter, and there it was held that the power of amotion ought to be previously exercised by the corporation, and the Court there said, that non-residence was not an immediate forfeiture, for reasons which set the matter in a very plain light. The reasons assigned are, that the office of free burgess is a freehold, and also that it was impossible to ascertain from what period the forfeiture

(*a*) 1 *Ves.* 1.

is

1820.

The King against The Mayor of Truro.

is to be dated; and they referred to *Rex* v. *Mayor of Leicester*. (a)

Scarlett, contrà, contended, that the words of the charter distinctly applied to the present case. For it stated that a new election was to take place on the happening of either of three events, viz. the death, non-residence, or amotion of any of the capital burgesses. Here it is clear that the power of amotion exists in this case; and it would be a useless ceremony (when the corporation appear and state their readiness to consent to any rule) to make it necessary for them to do a mere formal act prior to the granting of the mandamus.

Per Curiam. The general practice in cases of this sort is, not to grant a mandamus to elect unless the party has been previously amoved from the office. For a freehold office is not determined without some act done. In like manner as in a freehold lease on condition, if the condition be broken there must be an entry and ouster, in order to determine the lease. It is different, in the case of a lease for years on condition, where no such entry is necessary. The Court ought not to depart from its usual practice, unless the charter contains such plain and unambiguous words as could leave no doubt whatever. Here, however, that is not the case. For though it is stated, that in case any capital burgesses shall happen to die, dwell out of the borough, or be removed, others may be elected; yet at the end of the clause it is stated, that they shall be

(a) 4 *Burr.* 2087.

elected

elected in the place of those so happening to die or be removed. The intermediate case of dwelling out of the borough is here omitted. And it seems, therefore, upon the whole, that the words are not so plain and unambiguous as to warrant an interference contrary to the usual practice of the Court.

1820.

The KING *against* The Mayor of TRURO.

Rule discharged.

MELVILLE and Another *against* HAYDEN.

Friday, May 12th.

A guarantee of the payment of *A. B.* to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing or standing guarantee to that extent for goods to be at any time supplied to *A. B.* until the credit is recalled.

ASSUMPSIT. The plaintiff declared, upon a contract, to guarantee the payment of goods furnished by the plaintiffs to *Amos Moulden*: plea, general issue. The guarantee was as follows: "Memorandum, 23d *September*, 1818, I engage to guarantee the payment of Mr. *Amos Moulden* to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of *William* and *David Melville*." At the trial at the sittings in this term, before *Abbott* C. J. at *Guildhall*, the guarantee was proved. It appeared that there had been a delivery of goods for three quarterly accounts, all of which had been satisfied by *Moulden*: the default was made by him in the fourth quarterly payment, for which the action was brought. It appeared that in the first quarter goods to the amount of 59*l.* 4*s.* had been furnished, and in the second and third quarters to a greater extent. The learned Judge thought at the trial, that the guarantee was at an end before the goods were furnished for which the action was brought; and directed a nonsuit, giving to the plaintiff leave to move to enter a verdict

for

1820.

MELVILLE *against* HAYDEN.

for 60*l.* in case the Court should be of a different opinion. And now

Marryat moved for a rule nisi. This was a continuing guarantee. Here the expression is "quarterly account;" which, therefore, does not mean one quarter's account only, but an account once in each quarter, and, therefore, implies a dealing for more than one quarter of a year. And besides, it is not for goods to the extent of 60*l.*, but to the extent of 60*l.* for goods. The fair construction therefore of it is this, that it was a guarantee to the plaintiffs for their furnishing goods to *Moulden* upon certain terms, provided that the extent of the liability was not, in any one quarter, to exceed 60*l.*; and *Mason* v. *Pritchard* (*a*) is an authority to shew that a guarantee to a party for any goods he hath or may supply my brother *W. P.* with, to the amount of 100*l.*, is a continuing guarantee until the credit is recalled; and that case is very similar to the present.

ABBOTT C. J I had no doubt at the trial that this was not a continuing guarantee, and that it was applicable only to the first quarterly payment after it was given. I am still of the same opinion; and I think there is no ground for granting the present rule.

BAYLEY J. I am of the same opinion. The words "quarterly account" do not seem to me to vary the case; they only mean that at whatever time the goods might have been delivered, the account for them should be rendered quarterly. A party who takes a guarantee of this sort, should carefully provide that there are

(*a*) 12 *East*, 227.

words

1820.

MELVILLE *against* HAYDEN.

words in it expressive of its being a guarantee for goods to be furnished by him from time to time. In the case of *Mason* v. *Pritchard* that was the case. The words there were "for any goods he hath or may supply;" so that there the guarantee was applicable to any goods furnished at any time, to the amount of 100*l.*, whatever intervening payments might have taken place. They were, therefore, equivalent to the words "any goods furnished from time to time." In this case, however, I think there was no continuing guarantee, and therefore this rule must be refused.

HOLROYD J. The guarantee in this case does not go so far as that in *Mason* v. *Pritchard*; but was fully satisfied as soon as goods to the amount of 60*l.* had been purchased, and did not extend to such goods as might be purchased by him from time to time of the plaintiffs. The nonsuit, therefore, was right.

BEST J. I think the case of *Mason* v. *Pritchard* went as far as possible; but that case is distinguishable from the present. There the words were "for any goods;" here no such expression is to be found. The words "quarterly account" do not affect this question: they were introduced, as it seems to me, only to prevent the plaintiffs from calling for payment at so early a period as they might otherwise have done, for the goods furnished under the guarantee. It ought to appear unequivocally that it was the intention of the defendant to guarantee *Moulden*'s payments, for goods to be furnished from time to time. I cannot collect that from the present guarantee. The rule, therefore, must be refused.

Rule refused.

1820.

Friday, May 12th.

The KING *against* DOVE.

The 21 *Jac.* 1. *c.* 7. provides, that an alehouse-keeper suffering *inhabitants* of the parish to tipple, may be convicted on the oath of one witness, and the 1 *Car.* *c.* 4. extends the same penalty to the case of *strangers*, but requires proof by two witnesses: Held, therefore, that a conviction stated to be on the oath of one witness against an alehouse-keeper, for permitting persons to tipple in his alehouse, was bad, for not stating whether those persons were inhabitants or strangers.

PHILLIPPS had obtained a certiorari to remove, for the purpose of quashing it, a conviction against the defendant, who was an alehouse-keeper, for permitting and suffering several persons named in the conviction to remain and continue drinking and tippling in his alehouse, between the hours of 11 and 12 o'clock in the evening of the 2d of *October*, 1819, against the form of the statute. The conviction was stated to be made upon the oath of one credible witness; and the objection was, that it did not also state whether the persons who were suffered by the defendant to tipple in his alehouse, were inhabitants of the place or strangers; inasmuch as in the latter case the statute 1 *Car. c.* 4. must have been the statute referred to, and that act requires the conviction to be on the oath of two credible witnesses.

The *Solicitor-General* and *Walton* shewed cause. This question depends upon the construction of three acts of parliament, 1 *Jac. c.* 9. 21 *Jac. c.* 7. and the 1 *Car. c.* 4. By the first, any innkeeper permitting an inhabitant to tipple, was liable to be convicted on the oath of two witnesses: that act having expired, it was, by the 21 *Jac.* 1. re-enacted and made perpetual; but it was altered in this respect, that the conviction might be made upon the oath of one witness only. Then came the 1 *Car. c.* 4., which provided, that an alehouse-keeper permitting a stranger to tipple, should "incur the same penalty, and in such manner to be proved, levied, and disposed, as in the former statute of the first

year

year of his late majesty's reign." And the fair construction of the three statutes, therefore, is, that the 1 *Car. c.* 4. referred to the 1 *Jac. c.* 9., as it was altered by the 21 *Jac. c.* 7., the rule being that statutes upon the same subject must be construed as one law. If so, the conviction upon the oath of one witness will be equally good, whether the persons tippling were inhabitants or strangers; and then it was unnecessary to state that fact on the face of the conviction.

Phillipps, contrà. The 1 *Car. c.* 4. simply refers to the stat. 1 *Jac. c.* 9., which, although it had expired, still remained upon the statute-book. That act expressly requires proof by two witnesses; and the Court will not extend a case of a conviction under a penal statute, by the forced construction contended for on the other side. Although the amount of the penalty is trifling, yet by the 21 *Jac. c.* 7. *s.* 4. the present conviction, unless quashed, imposes a very heavy disability upon the defendant.

ABBOTT C. J. At the time when the 1 *Car. c.* 4. was passed, the legislature had in view both the statutes, for they refer distinctly to them both; and as they have, after that, directed that in the case of a conviction the proof shall be the same as that required by the 1 *Jac. c.* 9., I think that we are not at liberty to construe their meaning to be a reference to the 1 *Jac. c.* 9., as altered by the 21 *Jac. c.* 7. That being so, the objection to the present conviction must prevail.

BAYLEY J. The only safe way, in cases of this sort, is to abide strictly by the words of the act;

 and

1820.

The King against Dove.

and if we do so, there is no doubt that this conviction is bad.

Holroyd and Best Js. concurred.

Conviction quashed.

Saturday, May 13th.

Barrow *against* Humphreys.

Semble, That a party who is subpœnaed as a witness to attend at the assizes, is guilty of a contempt by neglecting to attend, although the cause be not called on for trial.

A RULE had been obtained, calling upon *William Davenport*, Esq., to shew cause why an attachment should not issue against him for not obeying a subpœna issued in this cause. The cause was entered for trial at the last assizes for *Chester*, and Mr. *Davenport* was subpœnaed on the part of the plaintiff, who attended with his witnesses, and delivered his briefs to counsel, and *previous to the cause being called on for trial*, Mr. *D.* was called in open court upon the subpœna, by the crier of the court; but not answering, the plaintiff was obliged to withdraw his record. The affidavit stated, that he was induced to do this solely by the absence of Mr. *Davenport*, without whose evidence he could not safely proceed to trial.

Cross Serjt. now shewed cause. The party was not in contempt until his evidence was required in the cause in which he was subpœnaed. In this case that cause was never called on for trial, and, consequently, there was no cause in which he could be called upon to give this evidence. In *Bland* v. *Swafford* (a), Lord *Kenyon* was of opinion, that no action would lie against a witness merely on the record being withdrawn, in any case, un-

(a) *Peake, N. P. C.* 60.

less

1820.

BARROW *against* HUMPHREYS.

less the cause had been called on and the jury sworn; and he stated, that the Court had no jurisdiction until such time as the jury were sworn. That case is in point. He then contended, that, upon the merits disclosed by the affidavits in answer, the rule ought to be discharged.

Scarlett, contrà. The party was in contempt by not obeying the order of the Court. The disobedience of the order, in its letter, constitutes the contempt. In the case of *Bland* v. *Swafford*, the action was brought against the witness for the damage sustained in consequence of his non-attendance, and no damages could be proved to arise from his neglect to attend, unless the cause were actually called on; and it was shewn to have been lost by the non-attendance of the witness.

ABBOTT C. J. I feel the utmost respect for any opinion that ever fell from Lord *Kenyon*. But, adverting to the form of the subpœna which commands the witness to be before the Court on a given day, it does seem to me, at present, that if a party forbears to attend, in obedience to it at the assizes, he is in contempt. I am by no means, however, prepared to say, that that is my deliberate judgment. It is not necessary to decide that question, because I am clearly of opinion, that, upon the merits, this rule ought to be discharged.

BAYLEY J. I incline to think, that if the Judge at nisi prius allows his officer to call the witness upon his subpœna, and he does not appear, he is then in contempt, for the order is to attend on a given day and hour to give evidence in the cause, and if he neglects so

1820.

Barrow *against* Humphreys.

to do, he is then guilty of a disobedience to that order, and that constitutes the contempt.

Holroyd J. Whatever may be requisite to make a witness liable in a civil action, in consequence of his non-attendance, I am of opinion, that he may be guilty of a contempt of Court, by not attending, although the cause be not called on. It is the neglect to appear, as required by the subpœna, that constitutes the contempt. If a party stay away so long as to shew that it is impossible for him to attend, he must be taken to stay away with a determination to disobey the order of the Court, and that is quite sufficient to call upon him to answer for the contempt. Upon the merits, however, I am of opinion, that this rule should be discharged.

Best J. Whenever a case similar to that of *Bland* v. *Swafford* shall again occur, it may be worthy of consideration, whether that decision can be supported. It appears to me, however, that there is a material distinction between that case and the present. An attachment for contempt proceeds not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court. Wherever it is distinctly shewn, that the party meant to disobey the order of the Court, he is guilty of a contempt. The calling of the witness upon the subpœna, is only for the purpose of obtaining clear evidence of his having neglected to appear, but that it is not necessary, if it can be clearly shewn by other means, that the party has disobeyed the order of the Court. Upon the merits, however, I agree with my Brothers, that this rule should be discharged.

Rule discharged.

SELIG *against* LEIDERSDORFF and Another.

Saturday, May 13th.

A defendant may be committed to the custody of the marshal upon a special original.

THE defendant, *Leidersdoff*, being in the custody of the warden of the *Fleet*, on common process issued against himself and the other defendant, his partner, was this day brought into court on a habeas corpus ad respondendum, and it appearing that there was a special original, returnable in this court on the morrow against the two defendants, *F. Pollock* moved, that the defendant, *Leidersdorff*, who alone was in custody, might be committed to the custody of the marshal of the *Marshalsea*, upon the cause of action in this court, and also upon that in the Common Pleas; and he cited a case in which the Court had made a similar order, in *Easter* term, 1819, and produced an office copy of the rule in that case.

HOLROYD J., who alone was in court, saw no objection, in principle, to the application; and as there was a precedent in the case cited, made the order as prayed.

Barnewall, on a subsequent day, moved to discharge the defendant out of the custody of the marshal, on the ground that the former committal was irregular, the writ, at that time, not being returnable. There was no bill or declaration in this court to charge him with. The writ being directed to the sheriff, he was ordered to have the defendant in court on a given day. The Court, however, said they saw no objection to the proceeding; and *Bayley* J. said, that provided the writ were

 return-

1820.

SELIG *against* LEIDERSDORFF.

returnable when the committal took place, the proceeding was regular; but that he had frequently been surprised to find, that defendants were committed to the custody of the marshal before the return of the writ, which was certainly irregular. In this case, however, the writ was now returned, and the defendant was in the proper custody.

Monday, May 15th.

DOE, on the Demise of WILLIAMS, *against* WINCH and Others.

The Court will not stay the proceedings in an ejectment until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid.

BARNEWALL had obtained a rule, calling upon the lessor of the plaintiff to shew cause why the proceedings in this ejectment should not be stayed until the costs of all former proceedings, both at law and in equity, should be paid. The following were the facts of the case. In the year 1805 the lessor of the plaintiff had caused an ejectment to be served upon *Henry Honnor*, who then possessed the premises, in which ejectment he did not further proceed; on the 15th *June*, 1805, *H. Honnor* was summoned to appear to a writ of right at the suit of the lessor of the plaintiff, for which an appearance was entered, and no further proceedings were taken. In *April*, 1806, the lessor of the plaintiff entered his writ of right in the manor court, and *Honnor* appeared, and the lessor of the plaintiff delivered his count in the said writ, and the then defendant, in 1808, pleaded thereto; since which no further proceedings had been had in that suit. In *June*, 1810, the lessor of the plaintiff filed his bill in Chancery against *Honnor*, praying that he might be ordered to

deliver

1820.

DOE *against* WINCH.

deliver up the premises therein mentioned (being the same premises for which all the former proceedings were had) to the lessor of the plaintiff, and account for the rents and profits. The defendant having appeared and answered, and the plaintiff having replied, the cause came on to be tried in *February*, 1815, when no person appearing for the plaintiff, the bill was dismissed with costs. On his application, however, it was restored, and was finally heard in *June*, 1818, and the Court ordered that the bill should be dismissed with costs. In *July*, 1818, the costs were taxed at 114*l.*, upon which a subpœna was issued against the lessor of the plaintiff for that sum, and various applications were made at his dwelling-house for the purpose of seeing him and requesting payment, but he was not to be found. The lessor of the plaintiff, not having paid the costs, again exhibited his bill in Chancery against *H. Honnor*, praying * to be relieved according to the prayer of the original bill, to which bill *H. Honnor* filed a demurrer; but before argument *H. Honnor*, in *November*, 1818, died, having by his will appointed the defendants his trustees and executors; and in the month of *October* last the lessor of the plaintiff caused a declaration in ejectment to be delivered to the defendants, for the recovery of the same premises as were comprised in the former proceedings. And now

Marryat shewed cause. The defendant is entitled only to a stay of proceedings until the costs of the former ejectment be paid. In the writs of right there are no costs allowed, and there is no authority for staying proceedings until the costs of a suit in equity are paid.

 Barnewall,

1820.

Doe *against* Winch.

Barnewall, contrà. The principle upon which the Courts have acted in staying the proceedings until the costs of a former suit have been paid, is the vexation and oppression caused to the defendant by several suits instead of one. In this case the defendant has been vexed with six different suits. The object of all was the recovery of the same premises. The proceedings in equity were in substance an ejectment; for the prayer of the bill was, that the premises might be delivered up to the defendant, the costs thereby incurred are as much a subject of vexation to the defendant as those in an ejectment. The practice formerly was for a court of law not to stay the proceedings unless the two ejectments were brought in the same court. (*a*) The modern practice is otherwise, and the courts now stay proceedings until the costs of a former ejectment are paid, whatever court it was commenced in. In *Doe, dem. Pinchard*, v. *Roe* (*b*), the Court stayed the proceedings until the costs of an action for mesne profits, as well as the costs of a former ejectment, were paid.

Abbott C. J. I think we should be going further than any court of law ever has done, if we were to order a stay of the proceedings until the costs of the bill in equity were paid. The costs at law are the legal consequences of the suit; the costs in equity are in the discretion of the Chancellor, and entirely depend upon circumstances. The usual form of the rule is, that the proceedings be stayed until the costs of the former ejectment be paid. It is true that in one instance the Court stayed the proceedings until the costs in the

(*a*) 1 *Sid.* 279. (*b*) 4 *East*, 585.

action

action also for mesne profits were paid; but the damages and costs in such an action are the consequences of the action in ejectment. I think, therefore, that this rule should be made absolute for staying the proceedings until the costs of the former ejectment be paid.

Rule absolute for staying the proceedings until the costs of a former ejectment be paid.

BISHOP *against* KAYE.

It is no ground of error upon a judgment of an inferior court that the plaint was levied before the cause of action accrued. In assumpsit, the defendant pleaded that the promises were made by him jointly with another, and issue was taken upon that fact. The jury, by their verdict, found that the defendant promised, without stating whether he promised alone or jointly with another: Held, that this verdict was bad, because it did not distinctly pronounce upon the issue.

THIS was a writ of error upon a judgment obtained in the Borough Court of *Nottingham*. It appeared upon the record, that on the 22d *October*, 1817, *Thomas Kaye* levied a certain plaint against *Thomas Bishop*, whereupon a summons issued, returnable on the 5th of *November*; and a capias afterwards issued to arrest the defendant, returnable on the 19th *November*. The declaration then stated, that on the 7th *November*, 1818, the defendant was indebted to the plaintiff in 58*l.* for money lent and advanced, &c. Plea, that the promises in the declaration were made by *Bishop* jointly with one *Thomas Crowther*, who is still living, and within the jurisdiction of the Court, as assignees of the estate of *W. T. B.*, a bankrupt, and not by the defendant alone: replication, that the promises made in the declaration mentioned were made by the said *T. Bishop* alone, in manner and form as the said *T. Kaye* hath above thereof complained against him, and not by *Bishop* jointly with the said *T. Crowther*, in manner and form as *Bishop* hath in his plea alleged. The record then stated the

venire,

1820.

Bishop *against* Kaye.

venire, and that the jury, by their verdict, found that *Bishop* did undertake and promise in manner and form as the plaintiff hath above thereof complained against him. Upon which the plaintiff obtained judgment in the Court below; and the record being removed by writ of error, the following causes were assigned: first, that it appeared that the plaint was levied, and the summons and capias were issued, before the cause of action had accrued; secondly, that the jury merely found that the defendant did undertake and promise, without finding that he alone did so undertake and promise. The case was argued in *Michaelmas* term, 1818, by

Chitty, for the plaintiff in error. The declaration states, that the defendant, on the 17th *November*, was indebted; and it appears upon the record that the plaint was levied on the 25th *October*. The suit was therefore commenced before the cause of action accrued. In *Foster* v. *Bonner* (*a*), it was held sufficient for the plaintiff to prove a trespass or injury before the bill filed, although after the latitat was returned; but that was because the bill was the commencement of the action. In *Venables* v. *Daffe* (*b*), which was an action by bill for maliciously indicting the plaintiff for keeping a bawdy-house, upon which indictment he was acquitted upon a day mentioned in the declaration, which day was after *Michaelmas* term began, it was held that the bill and and the declaration were bad, because it appeared that the plaintiff had no cause of action on the first day of *Michaelmas* term, to which day the declaration must

(*a*) *Cowper*, 454. (*b*) *Carthew*, 113.

relate;

relate; and he also cited *Purcell* v. *M'Namara*. (a) Upon the second point the finding of the jury is bad, in arrest of judgment; for the defendant pleaded that he promised jointly with another, but the jury have only found that he promised, but not that he promised alone. The verdict should find distinctly, and not argumentatively: here the finding should have been that the defendant undertook alone. The jury have left untouched the substance of the issue.

Littledale, contrà. The statute of jeofails extends to inferior courts, and the objection is therefore cured by verdict, *Hale* v. *Clare*. (b) The day in this declaration is not material. In *Cole* v. *Hawkins* (c), it was held, upon general demurrer, that in indebitatus assumpsit the day is not material, but was merely matter of form, and cause of special demurrer. In *Stafford* v. *Forcer* (d), it was held, in arrest of judgment, in an action on a promissory note, that the day was material, and a distinction was taken between an action founded upon a parol promise and a note. In this case, the action is founded upon a mere parol promise; but in *Heathers* v. *Bryan* (e), it was expressly held, that after verdict it was no objection that the plaint was levied in an inferior court before the cause of action accrued. That was an action upon a quantum meruit in the Palace Court, for the use and occupation of premises for three quarters of a year, ending on the 25th *March*. The plaintiff obtained a verdict; and it appeared from a transcript of

(a) 1 *Campb.* 199.
(b) 1 *Salk.* 266.
(c) 1 *Str.* 21.
(d) 10 *Mod.* 311.
(e) 1 *Wils.* 180.

the

1820.

Bishop *against* Kaye.

the record that the Court was held on the 10th *March*, which was before the three quarters of the year ended, and this was assigned for error; but the Court were of opinion that the objection was cured by verdict. In *Sayer* v. *Curtis*, which was an action of assault and battery in the Palace Court, it appeared that the plaint was levied some days before the day of the assault laid in the declaration; but the Court held, that this being after verdict, was aided by the statute 18 *Eliz*. And in *Waterton* v. *Plaxton* (a), which was an action of assault and battery; and upon error brought, it appeared that the day in the declaration was after the teste in the original writ; but being after verdict, it was held that the objection was cured by the statute 18 *Eliz.* In *Comyn's Digest*, tit. *Pleader*, 3 *M.* 5. it is laid down, that if the time is alleged to be after the declaration filed at any time, it is bad upon demurrer. He also cited *Pugh* v. *Robinson* (b), and *Lee* v. *Rogers*. (c)

As to the second point, the Court will intend every thing in favour of the verdict. It is sufficient, if the words of the finding can be so construed as to meet the issue; for it is not to be supposed that the jury have rejected a material and tried an immaterial issue. Now, the plaintiff complains in his declaration, that the defendant, being indebted to him, promised; and the replication states, that he promised, in manner and form as in his declaration alleged; and the jury have found that he *undertook*, which must be taken to be in manner and form as stated in the declaration, which states a sole promise. The jury, therefore, have substantially

(a) 9 *G.* 1. *C. B.* (b) 1 *T. R.* 116. (c) 1 *Lev.* 110.

found

found that the promise was made by the defendant alone, and not by him jointly with another.

ABBOTT C. J. I am of opinion that this case, upon the first point made in argument, is not to be distinguished from *Heathers* v. *Bryan*, and the authorities there cited; and consequently, that that objection is cured by verdict. But upon the second point, I think that the judgment cannot be supported; for the verdict does not distinctly find the issue joined between the parties.

BAYLEY J. I am of the same opinion. The authorities referred to in argument are decisive on the first point. The day in this case is wholly immaterial; and that distinguishes this from the case of *Venables* v. *Daffe*, where the day of the acquittal appeared upon the record to be after the commencement of the suit. There the day was material, because it described the record of acquittal; and in that case it must have been correctly set out, even if laid under a videlicet. I am of opinion, however, that the judgment must be reversed, upon the ground that the verdict does not distinctly pronounce upon the issue joined between the parties. The declaration charges, that the defendant promised. Now, that allegation may be supported either by proof of a joint or separate promise. The defendant, however, pleads that he promised jointly with another. The issue to be tried was, whether he promised jointly or alone. The jury have found merely that he promised, without saying whether alone or jointly. The verdict, therefore, does not pronounce upon the only point in issue

1820.

Bishop *against* Kaye.

issue between the parties. It is necessary that it should be shewn by the verdict, that the jury have taken into consideration the point in issue. The case of *Trevor* v. *Wall* (a) is an authority to shew that a court of error cannot award a venire de novo, when the proceedings originate in an inferior court.

Holroyd J. concurred.

(a) 1 *T.R.* 151.

Ex parte John Clarke.

Practice.

GURNEY moved that the Master be at liberty to enroll the copy of articles of clerkship of *John Clark*, the original articles having been lost. The Court granted the rule, and he was afterwards admitted, under a fiat of Best J., upon production of the copy of the articles, and the usual affidavits of his service, and of notices, &c.

CASES

ARGUED AND DETERMINED 1820.

IN THE

Court of KING's BENCH,

Trinity Term,

In the First Year of the Reign of GEORGE IV.

LODGE and Another *against* DICAS and RONDEAU, Gent.

Saturday, June 3d.

Upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to *A.*; *A.* was informed of this, and expressly agreed to exonerate the other partner from all responsibility: Held, that these circumstances did not constitute any defence to the latter in an action by *A.* against both partners.

ASSUMPSIT for work and labour. The defendant, *Dicas*, pleaded the general issue, and *Rondeau* suffered judgment to go by default. At the trial before *Abbott* C. J. at the *London* Sittings after last *Hilary* term, the following appeared to be the facts of the case: The two defendants, who were attornies, had been in partnership together at the time when the debt was contracted. Disputes having arisen between them, they agreed to dissolve their partnership, and it was arranged between them that *Rondeau* should receive the partnership debts and discharge the plaintiffs' demand. The plaintiffs had, however, no other knowledge of any arrangement between the parties than was given them

1820.

LODGE *against* DICAS.

by a letter from *Rondeau*, dated 8th *June*, 1818, which was as follows: "We have been arranging our accounts, and Mr. *Dicas* and myself have agreed that I should take the amount of your account on myself, which I will be responsible for to you." Upon receiving this letter the plaintiffs expressly agreed to exonerate *Dicas* from all liability as to the partnership account, and stated that they should charge it to *Rondeau*'s private account, he having continued to employ them as his agents. Some time afterwards *Rondeau* became embarrassed in his circumstances, and the present action, in *Easter* term, 1819, was commenced against both defendants. At the trial, *Abbott* C. J. was of opinion, that these facts did not amount to a good defence, and the plaintiffs had a verdict. *Scarlett* having, in last *Hilary* term, obtained a rule nisi for a new trial,

J. Williams shewed cause. It is clear that originally both *Dicas* and *Rondeau* were liable for this debt, and what circumstances are there to shew that either of them is discharged? There is no release, nor has there been any payment. It is true that where creditors have agreed to take a composition in lieu of their debts, no one of them can afterwards sue for the part remaining due, *Cockshott* v. *Bennett* (*a*). But that proceeds on the ground that such an action would be a fraud on the other creditors. Here that doctrine cannot apply. In this case no fresh security is gained by this arrangement to the plaintiffs, nor any new person made their debtor. There is, therefore, nothing to take from the plaintiffs

(*a*) 2 *T. R.* 763.

their

their original right of action against both the defendants. 1820.

Lodge against Dicas.

Scarlett, *Tindal*, and *Cottingham*, contrà. The general position laid down on the other side is not to be disputed. The question is, whether there was not evidence here to shew that the plaintiffs knew of and were parties to the arrangement between *Dicas* and *Rondeau*, and after that made the promise exonerating the former from all further responsibility. In that case there would be a sufficient consideration for the promise. For there needs not to be any advantage to the plaintiffs; it is sufficient if there be a detriment to *Dicas*, the defendant. And there was a detriment to him; for, in consequence of this promise, he permitted *Rondeau* to receive to his sole use the debts due to the partnership. This is in the nature of a covenant not to sue *Dicas*, leaving it open to the plaintiffs to sue *Rondeau*. It could not, therefore, be pleaded as a release. *Evans* v. *Drummond* (*a*), and *Read* v. *White and Others* (*b*), are authorities for the defendant. In *Bedford* v. *Deakin* (*c*) there was an express reservation of the liability of the other partner, which there is not in this case.

Abbott C. J. Even if it had been distinctly proved in this case that the plaintiffs were acquainted with the fact, that *Rondeau*, by virtue of the arrangement between him and the defendant, *Dicas*, was to receive the debts due to the partnership, and take upon himself the payment of this demand, I should still have had great doubt whether the plaintiffs had released *Dicas*; but in

(*a*) 4 *Esp. N. P.* 92. (*b*) 5 *Esp. N. P.* 122.
(*c*) 2 *B. & A.* 210.

the

1820.

LODGE *against* DICAS.

the absence of that proof, I am clearly of opinion that there is no defence to the present action. All that *Dicas* says is, that he will not interfere with *Rondeau*'s collecting the partnership debts. But there is no evidence whatsoever, except the expression in *Rondeau*'s letter of the 8th of *June*, 1818, in which he says, "We have been arranging our account, and Mr. *Dicas* and myself have agreed that I should take the amount of your accounts to myself;" from whence it can be fairly concluded that the plaintiffs knew at all of any arrangement between the parties? That, however, was clearly not sufficient to shew them the nature and terms of such arrangement; and unless that knowledge be brought home to them, there can be no doubt whatsoever in the present case.

BAYLEY J. It is quite clear that originally the plaintiffs had a right of action against both *Dicas* and *Rondeau*; and the only question is, whether *Dicas* has been discharged by the plaintiffs from it. It is for the defendant, *Dicas*, to shew how he was discharged. A release is one mode; another is satisfaction. It is clear that the former has not been given, and an agreement by the plaintiffs to abandon a claim, unless there be a consideration shewn, is a mere nudum pactum. Now what consideration is there in the present case? If, indeed, it had formed part of the agreement, that *Rondeau* should continue to employ the plaintiffs as his agent, it might have been different; for that would have been a benefit to them. Undoubtedly, however, there may be a consideration arising out of a detriment to the defendant; and it is said that the allowing *Rondeau* to collect the partnership debts was a detriment to *Dicas*, and might,

1820.

Lodge *against* Dicas.

might, therefore, be a good consideration for the plaintiffs' promise. But there is no evidence that that fact was known to the plaintiffs; and unless that be so, it can form no consideration for the promise in the present case. The plaintiff, therefore, there being no consideration at all for the promise, is remitted to his original right of action.

Holroyd J. I am of opinion that the plaintiff's right of action is not gone by the circumstances existing in this case. It was proved at the trial that there was an agreement that *Rondeau* should receive the partnership debts, and discharge this demand. Such an arrangement, however, will not deprive the plaintiffs of their original right of action, unless it amounts to satisfaction. In this case the plaintiffs gain no fresh security by having *Rondeau* as their debtor; and unless it could have been shewn that they were parties to the agreement between *Dicas* and *Rondeau*, there is no consideration whatsoever for the promise proved to have been made. Whether in case such an agreement had been proved, and they had been parties to it, it would have amounted to a release, or a covenant not to sue, is a question not now necessary to be determined. This rule, therefore, must be discharged.

Rule discharged. (*a*)

(*a*) *Best* J. was absent from indisposition.

1820.

Saturday, June 3d.

A factor has an authority to sell for money, but not to barter. And therefore where a factor bartered the goods of his principal, no property passed, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only.

GUERREIRO *against* PEILE and Another.

TROVER for 25 pipes of wine: plea, not guilty. At the trial before *Abbott* C. J. at the *London* sittings after *Hilary* term, the following appeared to be the facts of the case: The plaintiffs, who were merchants resident at *Oporto*, in *May*, 1818, consigned the wines in question for sale to *Burmester* and *Vidal*, who were merchants resident in *London*. They employed one *White*, a broker, to sell the same; and he, on the 29th *October*, by their orders, made the two following contracts with the defendants, which were both written on the same sheet of paper: "Bought 29th *October*, 1818, for Messrs. *Burmester* and *Vidal*, of Messrs. *Sol. Peile* and Son, 65 puncheons of *Jamaica* rum, of good clear merchantable quality, of average 15 per cent. over proof, 4*s*. 1*d*. per gallon; coopered and fitted up free on board; no bill to be drawn; the quality to be approved to-morrow. Sold 29th *October*, 1818, for Messrs. *Burmester* and *Vidal*, to Messrs. *Sol. Peile* and Son, 25 pipes of port wine, vintage 1815, 53*l*. per 138 gallons, housed and all charges paid; no bill to be drawn; *but this being considered a barter transaction for the above* 65 *puncheons rum, the balance is to be paid in cash:* as these wines have not been tasted by Messrs. *Peile* and Son, this contract to be void if not approved of to-morrow." *White* did not know that *Burmester* and *Vidal* were only factors in this transaction; nor was there any evidence to to shew that the defendants knew that fact. In pursuance of these contracts, *Burmester* received the rums, and the defendants the wines, and a balance was paid to the latter upon the two transactions. In *February*, 1819, *Burmester*

1820.

GUERREIRO *against* PEILE.

Burmester and *Vidal* became bankrupts, without having accounted to the plaintiffs for the proceeds of the wine. *White* proved that he had been frequently concerned in similar transactions of barter; and other witnesses proved that it was not an uncommon practice among principals to barter one species of goods for another. It was contended by the plaintiff, that *Burmester* and *Vidal* being merely factors, had authority to sell only in the usual way for money, but not to barter; and consequently that by these contracts no property had passed to the defendants. The Lord Chief Justice told the jury that if they were of opinion that *Peile* and Co. knew *Burmester* and *Vidal* to be factors, they should find for the plaintiff; and supposing that they did not know that fact, if the jury thought that this was a transaction in the ordinary course of trade when parties are dealing with their own commodities, they would find for the defendant. The jury found a verdict for the defendant. *Scarlett* in last *Easter* term obtained a rule nisi for a new trial, on the ground that the factor in this case had exceeded his authority by bartering, and consequently that no property passed to the vendor; and he cited *Anonymous* (*a*), and *Wiltshire* v. *Sims.* (*b*)

The Solicitor-General, *Gurney*, and *Puller*, now shewed cause. The jury have found that this was a transaction in the usual course of trade; and if so, it is clear that the principal was bound. Although this appears to be a case of barter, it really constitutes two distinct contracts of sale; a sale of the rums by *Peile*, and a sale of the wines by *Burmester* and *Vidal*.

(*a*) 12 *Mod.* 514. (*b*) 1 *Campb.* 258.

1820.

Guerreiro *against* Peile.

Abbott C. J. My learned Brothers think that I ought to have told the jury upon these facts, that this was a transaction of barter, and that the plaintiff's property was not divested, because a factor has no authority to barter; and I am also of that opinion. This rule must therefore be made absolute.

Bayley J. I am of the same opinion. *Burmester* and *Vidal* had authority only to sell, and that for money, to be forthcoming to the plaintiffs. But in this case not one farthing of money would ever be forthcoming to the plaintiffs; for the amount due for the rums exceeded the value of the wine.

Holroyd J. I am of opinion that *Burmester* and *Vidal* had no authority to barter. In looking at this transaction we must look at the real natnre of the thing, not at the colour given to it by the parties. If this had been a sale in market overt, the case might have been different; but that not being so, the principle of caveat emptor applies, and the person buying is bound by the authority which the person has who sells. Where a factor sells the goods of his principal, it is his duty to keep that sale wholly unconnected, and not to mix other matters with it to the detriment of his principal; and therefore the rule for a new trial must be made absolute.

Rule absolute. (*a*)

Scarlett, *Marryat*, and *Parke*, were to have argued in support of the rule.

(*a*) *Best* J. was absent from indisposition.

Cory and Others *against* Scott.

Saturday, June 3d.

Where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any effects in the hands of the acceptor: Held, that a subsequent indorsee, in order to entitle him to recover against the drawer, is bound to give notice of non-payment.

ASSUMPSIT. The plaintiffs were indorsees of the following bill of exchange drawn by the defendant, and dated *March* 6th, 1819: "Three months after date pay to my order the sum of two hundred and twelve pounds sixteen shillings and sixpence, for machinery, *G. Scott.* To Mr. *John Gordon*, 17, *Finch Lane*, *Cornhill*." The bill having been accepted by *Gordon*, was indorsed by the defendant to *R. Lough* and Co., and by them to the plaintiffs. It appeared upon the trial before *Abbott* C. J., at the *London* sittings after last *Michaelmas* term, that the bill was drawn for the accommodation of *Lough* and Co., and that neither the defendant nor *Lough* and Co. had any effects in the hands of *Gordon* the acceptor, who was a stranger to the defendant, and had accepted the bill solely for the accommodation of *Lough* and Co. No notice of the dishonour of the bill was given to the defendant. The declaration, after stating the default of *Gordon* the acceptor to pay the bill when due, contained an averment, as follows: "of which said several premises the defendant afterwards, to wit, &c. had notice." These facts having appeared, the Lord Chief Justice was of opinion that the plaintiff must be nonsuited, in consequence of no notice having been given of the dishonour of the bill. *Gurney*, in last *Hilary* term, in pursuance of leave reserved to him at the trial, moved to set aside this nonsuit and to enter a verdict for the plaintiff, on the ground that notice was not in this case necessary; and he

1820.

Cory against Scott.

he cited *Bickerdike* v. *Bollman* (a), and *Walwyn* v. *St. Quintin.* (b)

Reader now shewed cause. It is not necessary, perhaps, to discuss the question whether in this case notice of dishonour was requisite; for by the form of the declaration the plaintiffs have made it incumbent on themselves to prove it, for they have expressly stated that the defendant had notice. In *Orr* v. *Maginnis* (c) and *Legge* v. *Thorpe* (d), which were both cases where the necessity of notice was sought to be dispensed with, special averments were introduced into the declaration for that purpose. A party must declare either according to the fact or the legal effect: but neither is done here; for the want of effects in the acceptor's hands amounts to an excuse for not giving notice, but not to notice. The case of *Reeson* v. *Pigott*, *Bayley on Bills*, 187 ed., *Barnes*, seems to have gone on this principle. There the proof that the drawer could not be found, which would be a valid excuse for non-presentment, was held not to be sufficient in a case where the declaration contained an averment of presentment. The proof of a subsequent promise is sufficient; for that affords evidence of the truth of all the allegations in the declaration being tantamount to an admission by the party. As to the necessity of notice of dishonour in this case, it may be observed that the decision in *Bickerdike* v. *Bollman* has been much regretted. The Court will not therefore feel inclined to extend it. The present case does not come within it. In *Bickerdike* v.

(a) 1 *T. R.* 405. (b) 1 *B. & P.* 652.
(c) 7 *East*, 359. (d) 12 *East*, 171.

Bollman

Bollman no possible detriment could arise to the drawer from the want of notice; but here much damage might result from it, for the drawer has in this case a remedy over against *Lough* and Co. Besides, although he knew that he had no effects in *Gordon*'s hands, it does not appear that he knew that *Lough* and Co. had not; and if he had a reasonable expectation that the bill when presented would be paid, either from the funds of *Lough* and Co. or his own, it is sufficient to entitle him to notice of dishonour. It must be admitted that it is difficult, if not impossible, to distinguish this case from that of *Walwyn* v. *St. Quintin*; but that case requires further consideration.

1820.

CORY *against* SCOTT.

Gurney and *Tindal*, in support of the rule. The cases of *Orr* v. *Maginnis* and *Thorpe* v. *Legge* are not decisive upon the point for which they are cited. In those cases special averments were introduced; but that does not shew those special averments to have been necessary. In *Lundie* v. *Robertson* (*a*) the declaration contained all the averments of presentment, &c.; and the plaintiff recovered, although no proof, except a subsequent promise to pay the bill, was given in evidence. Here notice was unnecessary; and the rule is, that where an allegation is unnecessary it may be struck out, and needs not be proved; and *Boulager* v. *Talleyrand* (*b*) is an authority expressly in point. As to the other point, where a drawer having no effects in the acceptor's hands draws upon him, he cannot have any reasonable expectation that the bill will be paid, and therefore it is useless to give him notice of it. This was decided in *Bickerdike* v. *Bollman*. The case of *Walwyn* v. *St.*

(*a*) 7 *East*, 231. (*b*) 2 *Esp*. 550.

1820.

Cory *against* Scott.

St. Quintin is precisely in point, and is a stronger case than the present; for there the person in whose favour the bill of exchange was drawn had effects in the drawer's hands: here, neither the defendants nor *Lough* and Co. had any effects in the hands of *Gordon*.

Abbott C. J. I am of opinion that in this case the nonsuit was right. It has been held that the drawer of a bill who has no effects in the hands of the acceptor, and who has no right upon any other ground to expect that the bill will be paid, is not entitled to notice of its dishonour; and that, for this reason, because the facts shew that he must have known that the bill when presented would not be paid. That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. This case, however, is very different. The ground for the former decision was, that if notice had been given, there would still have been no person to be found upon whom the party to whom notice was omitted to be given might call for the money; but here, at least one, and perhaps two persons, are in that situation. For the defendant might have called on *Lough* and Co. to pay the money, and I think, too, that he might have called upon the acceptor *Gordon* to do so. It is not necessary, however, to decide that question, because his having it undoubtedly in his power to call upon *Lough* and Co. is quite sufficient to distinguish this case from *Bickerdike* v. *Bollman*. There is, however, great difficulty in distinguishing it from *Walwyn* v. *St. Quintin*. But I must say that I cannot assent to the law there laid down; for if notice had in that case been given to the drawer, he might

might have had his remedy over against a third person. As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further. I think, therefore, that the present nonsuit was right.

Bayley J. If the drawer could have been protected by want of notice in a case where the giving of such notice could have been of no use to him, it would have been contrary to the principles of law. The case of *Bickerdike* v. *Bollman* is therefore a right decision; but wherever the drawer can shew that the want of notice may produce any detriment, the case will be very different. Where he has no effects in the hands of the acceptor, that is primâ facie evidence that he will not be injured by the want of notice; but that primâ facie presumption may be rebutted; and if the drawer can shew actual prejudice, it takes it out of the case of *Bickerdike* v. *Bollman*. One test is this; suppose the drawer to pay the bill, has he any remedy over against a third person? In the case of *Bickerdike* v. *Bollman* he had none; but here, if the defendant had paid the bill, he would clearly have had a remedy over against *Lough* and Co. because they impliedly undertook to indemnify him; and he would also, as it seems to me, have had a remedy over against the acceptor. The case of *Walwyn* v. *St. Quintin* is very similar to the present, and I am not sure that it can be distinguished from it. That case, however, is inconsistent with the decision in *Brown* v. *Maffey*. (a) In that case all the parties to the bill pre-

(a) 15 *East*, 216.

vious

1820.

Cory *against* Scott.

vious to *Wood* were accommodation parties; yet there the defendant, who was one of them, was protected by want of notice, in consequence of such notice being held to be material to him with respect to his remedy over against *Wood*. That decides the present case. Besides, it may also be contended, that the drawer in this case might fairly expect that *Lough* and Co. had funds in the drawer's hands; and in that case, it would be very hard to hold that he might be called upon, without any previous notice, to pay the bill at any time within six years, and after all his transactions with *Lough* and Co. were at an end. On the other point, I am inclined to think that it is incumbent on the plaintiffs to allege, in their declaration, the want of effects, in order to excuse notice. If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances which excuse the giving of notice, does not seem to me to be ad idem with such an averment. Possibly, however, it might be considered that such circumstances would be evidence of notice, inasmuch as they would be evidence that the party knew the bill would be dishonoured. It is not necessary, however, to decide that question, as I am clearly of opinion that a notice in this case was requisite.

Holroyd J. I am of the same opinion. The universal rule which prevailed until the decision of *Bickerdike* v. *Bollman* was, that notice of dishonour must be given to the drawer within a reasonable time, in order that he might have recourse to such remedy, against any other person, as the law would give. In that case, however, the necessity of giving such notice was dispensed with, upon the ground that there no possible

detri-

detriment could arise to the drawer from want of notice, which circumstance was adverted to by *Buller* J. in his judgment. That case has been also considered as proceeding on the ground of fraud, and it is put upon that ground by Lord *Alvaney* and by *Heath* and *Chambre* Justices, in *Clegg* v. *Cotton* (*a*), which was subsequent to the decision of *Walwyn* v. *St. Quintin*. If a party has no effects in the drawee's hands, and has no reason to expect that the bill, when presented, will be paid, he is not to expect notice to be given. And, besides, his knowledge of the fact that the bill will be dishonoured, is evidence from whence a jury might presume that he had notice. And, therefore, either upon the ground of fraud or of knowledge, the case of *Bickerdike* v. *Bollman* may be supported. But neither of those grounds apply here. For here the party who has only lent his name as a surety is guilty of no fraud, and the want of notice may be of the greatest importance to him, by preventing him from having recourse to the persons in favour of whom he drew the bill. It seems to me, therefore, that in this case the general rule of law ought to prevail. As to the other point, I think that where a person draws on his own account, and at the same time knows that the bill, when presented, will be dishonoured, the general allegation of notice, as in this declaration, would be sufficient. It is not, however, necessary to decide that point in this case, inasmuch as it is quite clear that, upon the first point, our judgment must be for the defendant.

Rule discharged. (*b*)

(*a*) 3 *B.* & *P.* 242.

(*b*) *Best* J. was absent from indisposition.

Monday, June 5th.

SHORT *against* M'CARTHY.

Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of *England* to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do: The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. Held, the statute of limitations having been pleaded, that upon this form of declaration, the plaintiff was not entitled to recover.

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that upon this record, such an acknowledgment was not sufficient.

THE Declaration stated, that before the making of the promise on the 1st *November*, 1812, it had been represented to the plaintiff, that one *Joseph Bennyworth* did, by his will, bequeath unto *John Watkins* and *Aaron Powell*, 700*l.* five per cent. bank annuities, standing in his name, in the books of the Governor and Company of the Bank of *England*, upon trust, to permit his wife to receive the dividends during her life; and, after her decease, to transfer the same to such persons as one *Mary Shaun* should direct. The declaration then stated, that *Bennyworth* died without altering his will, and that *Elizabeth Bennyworth* was living, and entitled to the produce of the bank annuities, during her life, and that *Mary Shaun* had power to sell the same, subject only to the life interest of *Elizabeth Bennyworth*; and that it had been proposed, that *Mary Shaun* should, in consideration of 340*l.*, to be paid to her by the plaintiff, sell and dispose of the said bank annuities, subject to the life estate; and thereupon, in consideration that the plaintiff, at the request of the defendant, had retained and employed him, then being an attorney of this court, for reasonable fees and reward to him in that behalf, to ascertain whether the said sum of 700*l.* five per cent. bank annuities, was standing in the books of the Bank of *England*, in the names of *J. Watkins* and *A. Powell*, or of any other person, for the benefit of *Elizabeth Benny-*

worth,

worth, during her life, and for that of such person, on her decease, as *Mary Shaun* should direct. The defendant undertook, and promised the plaintiff, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant diligently and sufficiently to search at the Bank of *England*, in order to ascertain whether such sum 700*l.* five per cent. bank annuities was standing in the names of *J. Watkins* and *A. Powell*, or either of them, at the Bank of *England*, he, defendant, did not diligently and sufficiently search at the Bank for that purpose, but afterwards falsely represented and affirmed to the plaintiff, and caused the plaintiff to believe, that the sum of 700*l.* five per cent. bank annuities was standing in the names of the said *J. Watkins* and *A. Powell*, for the benefit of *Elizabeth Bennyworth*, during her life, and for the benefit of such persons, on her decease, as *Mary Shaun* should direct; by reason whereof, defendants paid to *Mary Shaun* the said sum of 340*l.* as the consideration for the purchase of her interest in the said supposed sum of 700*l.* five per cent. bank annuities, whereas in truth and in fact, the said sum of 700*l.*, five per cent. bank annuities was not standing in the names of *John Watkins* and *Aaron Powell*, or in the name of either of them, or in the name of any person, for the benefit of *Elizabeth Bennyworth*, during her life, and of such persons, on her decease, as *Mary Shaun* should appoint, so that the defendant lost his 340*l.*, and was put to great charges and expenses. Plea, first, general issue. Secondly, that the cause of action did not accrue within six years. At the trial, before *Abbott* C. J., at the *London* sittings after last *Hilary* term, it appeared in evidence, that in *December*, 1812, the plaintiff, having

 agreed

1820.

SHORT *against* M'CARTHY.

agreed to give 340*l.* for the 700*l.* bank annuities, to Mrs. *Shaun*, for her interest in the stock, applied to the defendant, who was an attorney, for the purpose of having the bargain carried into effect. The instructions stated by the witnesses to have been given, were, that the defendant should see that every thing was right. The deeds were accordingly prepared and executed at the time, and the money was then paid by the plaintiff. It subsequently turned out, that no enquiries had been made at the Bank of *England*, and that there was no such stock standing in the trustees' names, to which Mrs. *Shaun* was entitled. This discovery was made in *August*, 1818, and the defendant, on being then applied to, said that it was owing to an omission of his clerk, and that he was responsible. The jury found a verdict for the plaintiff. *Scarlett*, in last *Easter* term, having obtained a rule nisi for setting aside this verdict, and for entering a nonsuit,

Tindal now shewed cause, and contended, first, that the cause of action did not accrue, till the period of the discovery of the defendant's negligence by the plaintiff, which was admitted to have been made in *August*, 1818. If this be not so, it will only require a certain degree of caution to prevent the discovery of the negligence for the period of six years, and then the party will be wholly without a remedy. In *Bree* v. *Holbech* (*a*), it is laid down, that in cases of fraud, the statute of limitations only runs from the time when the fraud is discovered. That principle ought to govern the present case. In *Battley* v. *Faulkner* (*b*) the breach was known to the plaintiff more than six years before the commencement of the suit,

(*a*) *Doug.* 654. (*b*) *Ante*, 288.

which

1820.

SHORT against M'CARTHY.

which affords a distinction from the present case. But at all events, the subsequent promise takes this case out of the statute. The maxim of the law is quilibet renunciare potest juri pro se introducto; and here the defendant has waived his right of insisting on the defence given by the statute. *Dickson* v. *Thomson* (*a*) shews the difference between an acknowledgment and a promise. This is the case of a promise, and that distinguishes it from *Boydell* v. *Drummond.* (*b*)

Scarlett and *Chitty*, contrà. The reason why the subsequent promise takes the case out of the statute is, that the previous debt forms a good consideration for it, and so enables the party to declare upon that subsequent promise. But here the party has not declared upon the subsequent, but on the original promise, which was a very different one. The evidence, therefore, if the subsequent promise be relied on, does not support the declaration. *Boydell* v. *Drummond* is a distinct authority to shew, that an acknowledgment like the present is not sufficient. Here there is no fraud on the part of the defendant, but only negligence, and the doctrine to be found in *Bree* v. *Holbech* does not apply: and the decision of the Court there is precisely in point for the defendant. The circumstance of knowledge can make no difference. In ejectment, a party is barred after an omission to sue for twenty years. But in most cases, that omission arises from his ignorance of the validity of his claim. The statute which makes some exceptions, does not mention want of knowledge as one, and the Court, therefore, will not introduce it now for the first time.

(*a*) 2 *Shower*, 126. (*b*) 2 *Campb.* 162.

1820.

SHORT *against* M'CARTHY.

ABBOTT C. J. This is an application to enter a nonsuit; and, upon full consideration I am of opinion that a nonsuit ought to be entered. If the plaintiff can, consistently with the rules of law rely upon the subsequent promise, he may do so, upon a new declaration specially framed for that purpose. But I am of opinion, that he cannot do so upon a declaration in this form. If his want of knowledge of the actual injury sustained, till within the period of six years anterior to the commencement of this action, be sufficient, it will be competent for him to avail himself of that hereafter. Upon the present declaration, I cannot say that the cause of action there stated arose within six years before the commencement of the present action: for the cause of action there stated, is the omission of the defendant to make due inquiries at the Bank. Leaving it, therefore, open to the plaintiff to avail himself of these points, in case he shall be advised to bring a fresh action, I am of opinion, that, in the present case, a nonsuit must be entered.

BAYLEY J. Upon these pleadings I am of opinion, that the plaintiff is not entitled to recover. This declaration states, that the defendant was retained to ascertain whether a sum of money was standing in the books of the Bank of *England*, in the names of certain persons, and that he neglected diligently and sufficiently to search in the books of the Bank of *England* for that purpose, by reason of which the plaintiff sustained the loss in question. *Now all these facts existed above six years before the action was commenced. The defendant's promise, his negligence, the payment of the money by the plaintiff, in short, the whole cause of action existed

existed above six years ago. Mr. *Tindal's* argument is this, that as the plaintiff did not know the injury he had sustained, till within the six years, the cause of action had not accrued; but I think the cause of action accrued from the time the breach took place. If the want of knowledge could take the case out of the statute of limitations, it would be competent to the plaintiff to state this in his replication; and the same observation applies to the subsequent promise. The common cases of acknowledgment are entirely different. There the acknowledgment raises, by implication, the same promise as that stated in the declaration. But the declaration must be so framed as to agree with the acknowledgment, and, therefore, in an action by an executor, upon promises to the testator, in his life-time, it is not sufficient, in answer to a plea of the statute of limitations, to give in evidence an acknowledgment to the executor within six years. In this case, there is no promise stated in the declaration, to which this acknowledgment can apply. Upon these pleadings, therefore, I am of opinion, that a nonsuit must be entered.

HOLROYD J. The issue upon the record is, whether the cause of action stated in the declaration, accrued within six years: and, as I am of opinion, that the cause of action accrued from the time of the breach of duty by the defendant, and not from the time of its discovery by the plaintiff, it follows that a nonsuit must be entered. In the case of a subsequent promise, in order to take a debt out of the statute of limitations, the subsequent promise must agree with the original promise stated in the declaration; and, therefore, it has been frequently held, that a subsequent

 acknow-

1820.

SHORT *against* M'CARTHY.

acknowledgment to an executor, will not support a declaration, framed on promises to the testator, because the question upon the record is, whether the promise was made to the testator within six years. The question upon this record is, whether the neglect of the defendant took place within six years. The plea of the defendant has been proved, and the subsequent acknowledgment, although it may, perhaps, give a new right of action upon a declaration specially framed for that purpose, does not establish the issue upon this record, and does not entitle the plaintiff to recover. This rule for entering a nonsuit must be absolute. (*a*)

Rule absolute.

(*a*) *Best* J. was absent from indisposition.

DOE, Demise of LE CHEVALIER, *against* HUTHWAITE and Another.

Devise to *H.D.* for life, with remainder to the first son of *C.D.* in tail male, and in default of issue to his second son in tail male, and in default of his issue to the third, fourth, fifth, and sixth sons, in tail male, severally and successively, in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth; the several and respective heirs male of all and every son, every elder of such sons and his heirs male being preferred to and to take before the younger; and in default of such issue, then to the first, second, third, fourth and all, &c. the daughters of *C. D.* and their issue, severally, successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to and to take before the younger; and in default of any such issue, then to *G. H.*, the eldest son of *T. H.*, of *Nottingham*, for life, with limitation to his first and other sons and daughters similar to those to the children of *C. D.*; and in default of such issue, to *S. H.*, second son of *T. H.*, of *Nottingham*, for life, with precisely the same limitations to his first and other sons and daughters as in the preceding; and in default of such issue, to *J. H.*, the third son of *T. H.*, of *Nottingham*, for life; with remainder to his children, as in the preceding limitations. *S. H.* was in fact the *third* and *J. H.* the *second* son of *T. H.* of *Nottingham*: Held, that evidence of the state of the testator's family, and other circumstances, was admissible to shew whether he had mistaken the name of the devisee or not; and, upon such evidence being given, that it became a question of fact for the jury, whether the mistake was in the name or in the description.

EJECTMENT, on the demise of *S. F. Le Chevalier*, and *Keturah Mary*, his wife. Plea, not guilty. The cause was tried before *Holroyd* J. at the *Nottingham*

Spring

1820.

Doe against Huthwaite.

Spring assizes, 1817, when a verdict was found for the plaintiffs, subject to the opinion of the Court of Common Pleas on a special case, with liberty to either party to turn the same into a special verdict. The Court of Common Pleas gave judgment for the defendants. The case was then turned into a special verdict, and removed into this court by writ of error. The special verdict stated the following facts: *George Donston* was seised of the tenements in question in fee, and on the 17th *May*, 1781, by his last will in writing, duly executed and attested for the passing of real estates, after bequeathing several legacies, and, amongst others, the sum of 1000*l.* to all and every the children of *John Huthwaite*, of the town of *Nottingham*, mercer, to be equally divided amongst them, devised, subject to certain annuities mentioned in the will, all his real estates whatsoever, including the premises for which the action was brought, to certain trustees therein named, upon the following trusts; to the use of *Starkie Donston*, son of *Henry Donston*, for life, with remainder to the first son of *Starkie Donston*, in tail male, and in default of such issue, to the second son of *Starkie Donston*, in tail male; and in default of such issue, to the third, fourth, fifth, sixth, and all and every other son and sons of *Starkie Donston*, severally and successively in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth, the several and respective heirs male of all and every such son and sons, every elder of such sons, and his heirs male being always preferred, and to take before the younger; and in default of such issue, there were similar limitations to the first, second, third, fourth, and all other daughters of t said *Starkie Donston*, and

 their

1820.

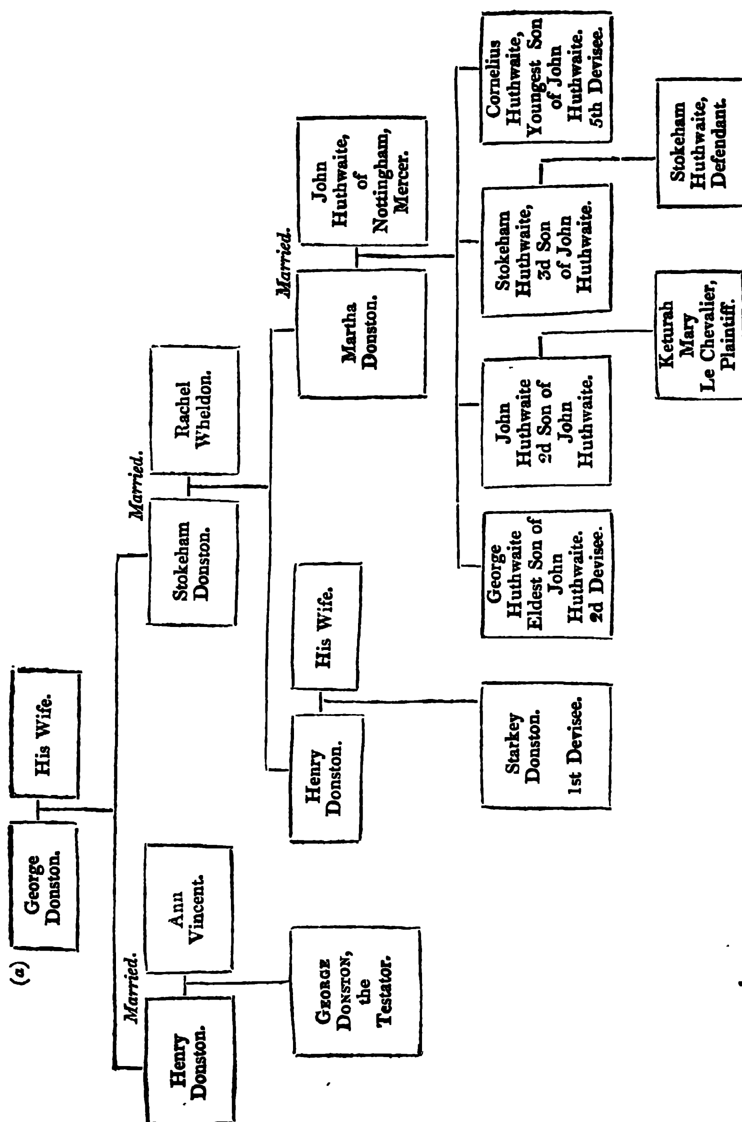
DOE against HUTHWAITE.

their issue severally, successively, and remainder, one after another, in order and course as they should respectively be in seniority of age and priority of birth; and among the several heirs, every elder of such daughters being always preferred, and to take before the younger; and in default of such issue, to *George Huthwaite*, the eldest son of *John Huthwaite*, of *Nottingham*, mercer, for life, remainder to the first son of *George Huthwaite* in tail male; and in default of such issue, to the second son of *George Huthwaite* in tail male, remainder to the third, fourth, fifth, sixth, and all and every other son and sons of *George Huthwaite* severally and successively in remainder, one after another in order and course as they should respectively be in seniority of age and priority of birth, and the several and respective heirs male of such son and sons, every elder of such sons, and the heirs male of his body, being always preferred, and to take before the younger of them, and the heirs male of his body: then there were the same limitations to the first, second, and other daughters of *George Huthwaite* as to those of *Starkie Donston*; and then, in default of such issue, to *Stokeham Huthwaite, second son of John Huthwaite*, for life, with remainder to his first and other sons and daughters, in the same terms as in the preceding limitations; and in default of his issue, to *John Huthwaite, the third son of the above-mentioned John Huthwaite*, for life, with remainder to his first and other sons and daughters in strict settlement as in the preceding limitations; and in default of such issue, to *Cornelius Huthwaite*, the youngest of the sons of the said *John Huthwaite*, for life, with remainder to his children in strict settlement; and in default of his issue, to .. *Dalzel* for life, with remainder

mainder to his children in strict settlement (*a*); and in default of his issue, to *George Nevil*, with remainder to

DOE *against* HUTHWAITE.

(*a*)



1820. Doe against Huthwaite.

his children, also in strict settlement; and in default of his issue, to *Christopher Nevil*, with remainder to his children in strict settlement; and in default of his issue, to *Edward Nevil* for life, with remainder to his children in strict settlement; and in default of his issue, to the testator's right heirs for ever. At the date of the will *Starkie Donston* was the nearest relation to the testator on the side of his father, and the sons of *John Huthwaite*, of the town of *Nottingham*, mercer, were his next nearest relations. The testator died in 1784, seised of the premises in question, without revoking his will. *Starkie Donston* died without issue in the lifetime of the testator. Upon the death of the testator *George Huthwaite*, the eldest son of *John Huthwaite*, of *Nottingham*, entered upon the premises under the will, and died without issue of his body in *March*, 1817. *John Huthwaite* was the second son of *John Huthwaite*, of *Nottingham*, and he died in *March*, 1788, leaving issue *Keturah Mary*, the wife of *S. H. Le Chevalier*, and *Stokeham Huthwaite* was the third son of *John Huthwaite*, of *Nottingham*, and he died, leaving issue *Stokeham Huthwaite*, one of the defendants, his eldest son. *Mary Le Chevalier* was the heir at law of *George Donston* the testator. It then stated the demise by the lessor of the plaintiff, and an ouster by the defendant.

Shadwell, for the lessor of the plaintiff. Under this devise *John Huthwaite*, the second son, takes the estate before *Stokeham Huthwaite*. The devise is to *Stokeham Huthwaite* by name, but by description to *John Huthwaite*, who is the second son. The name and the description are wholly inconsistent with each other; and the question is, what the intention of the testator was.

That

That intention is to be collected from the whole of the will, and it is evident that in the disposition of his property he had regard to priority of right as founded on priority of birth; his intent was that his estate should go in the same order as it would have gone if he had died intestate. Six different devisees are designated by name in the will; to each of these he gives an estate for life, with remainders in strict settlement, their children in every case being preferred according to priority of birth. To adopt the construction contended for on the other side would be inconsistent with every other restriction and regulation contained in the will, and contrary, therefore, to the general intention of the testator. It will be contended in this case, that the name must prevail over the description; but the application of names, and the situation in which the parties stand, are circumstances only by which it is to be collected who was the individual intended to take under the will. The name, indeed, is one material circumstance; but there may be others in the disposition of the property, which are sufficiently strong to shew that there is a mistake in the name, and that the intention was that another person should take. From the whole of this will it is evident, that the intention of the testator was, that in every case the second son should take before the third. There is a mistake either in the name or in the description. It is impossible that the testator should have been mistaken with respect to the order of succession, and he may have been mistaken with respect to the names of the parties. Putting it, therefore, on the ground of probability, the safer course would be that the devisee should take according to the order of succession. There are many cases to be found in the books, both

with

1820.

Doe *against* Huthwaite.

with respect to deeds and wills, where the names of the grantees or devisees have been mistaken, and the Courts have collected the intention from the whole of the instrument, and corrected the mistake. In *Co. Litt.* 3. *a.* it is said, "A wife is a good name of purchase without a christian name, and so it is if a christian name be added and mistaken, as *Em* for *Emelyn*, &c., for utile per inutile non vitiatur." Here the party is sufficiently described as a second son, and the name may be rejected as useless. In the same passage Lord *Coke* says, "If lands be given to *Robert* Earl of *Pembroke*, where his name is *Henry*; to *George* Bishop of *Norwich*, where his name is *John*; and so of an abbot; for in these and the like cases there can be but one of that dignity or name; and, therefore, such a grant is good, albeit the name of baptism be mistaken." In 3 *Leon. p.* 18. *case* 44. there is this case, "Lands were given to the mayor, chamberlain of the hospital of *Saint Bartholomew, London*, whereas they were incorporated by another name; yet the devise is good by *Weston* and *Dyer*, which *Manwood* also granted, because it shall be taken according to the intent of the devisor; and it was said by *Weston*, "If lands be devised to *A.*, eldest son of *B.*, although that his name be *W.*, yet the devise to him is good, because there is sufficient certainty." In *Pitcairne* v. *Brase* (*a*), the devise was to *William Pitcairne*, the eldest son of *Charles Pitcairne*, of *Twickenham*; the name of the eldest son was *Andrew*, and this was held to be a good devise to him, so that the description was preferred to the name; and it is there said, "that the rule is the same in the civil law; as, for instance, where the testator devised

(*a*) *Finch's Reports*, 403.

lands

lands or tenements by a wrong name, if this mistake appears otherwise by circumstance, so that the will of the testator may be sufficiently known, the legacy shall have its effect, though the true name is mistaken. *Dom.* 1., vol. 54." In *Thomas* v. *Thomas* (*a*) the devise was to my grand-daughter, *Mary Thomas*, of *Llechlloyd*, in *Merthyr* parish; and at the time of the testator's death, he had a grand daughter of the name of *Elinor Evans*, who lived at *Llechlloyd*, in *Merthyr* parish, and a great grand daughter, *Mary Thomas*, who lived elsewhere, some miles from *Merthyr* parish; the devise was held void for uncertainty. In that case, although the devisee was designated by name; yet, inasmuch as the description was inconsistent with the name, it was held to make the devise void. The name, therefore, is rejected, when the Court clearly see, from other circumstances, what the intention of the testator was. In *Smith* v. *Coney* (*b*), the will gave a legacy to the Reverend *Charles Smith*, of *Stapleford Tawney*, in the county of *Essex*; there was a person of the name of *Richard Smith*, answering the description in the will, and there was an officer in the army of the name of *Charles Smith*, known to the testatrix. It was held, however, that the Reverend *Richard Smith* was entitled to the legacy. The description was there preferred to the name. These cases shew, that the name is only one circumstance by which a party may be designated; and if it appear, from other circumstances, that another person was intended, the Court will construe the will according to the general intention of the testator. Here, it does sufficiently appear, from the whole of the will taken together, that the testator in-

(*a*) 6 *T.R.* 671. (*b*) 6 *Ves.jun.* 42.

1820.

Doe *against* Huthwaite.

tended that *John Huthwaite* should take the estate before the third son. If, however, the devise is void for uncertainty, the lessor of the plaintiff is entitled to recover as heir at law.

Denman, contrà. *John Huthwaite* cannot take under a devise to *Stokeham Huthwaite*, although the latter be improperly described as the second son. The maxim of law applies in this case (*a*), "veritas nominis tollet errorem demonstrationis," for the devisee is here rightly designated, both by his christian and surname. If there had been no devise subsequent to that to *Stokeham Huthwaite*, the case would not have admitted of argument. The argument on the other side, assumes that the testator could have no reason for preferring the third to the second son, but nothing appears to shew, that the third son may not have been the object of selection from motives of personal affection; and the mistake may, therefore, as well be in the description as in the name. In *Dyer*, 119 a. *pl.* 7., it is said, if an obligation made to *J. S.*, son and heir of *G. S.*, when, in truth, he is a bastard, or as the book 9 *Edw.* 4. 29 b. is, a woman was bound by the name of *Alice S.*, wife of *J. S.*, and in truth she was a widow; or contrà, if she be called widow while she is a feme covert, these words are only nugatory. In *Lord Evers* v. *Strickland* (*b*), a conveyance was made to *Rodolph Evers*, Knight, Lord *Evers*; at that time he was not a knight, or known as such; it was held, however, that he might take under the deed, and it is there said, that the addition of knight, though false, should not take away the description of the true

(*a*) *Lord Bacon's Maxims.* (*b*) *Bulst.* 21.

person

person to whom the conveyance was made, but that he ought to have the same, being sufficiently expressed by the name of Lord *Evers*. These are cases, therefore, where the name has prevailed over the description. The devise, in this case, is to *Stokeham Huthwaite* by name; there was a person of such a name, and only one; the devise, therefore, cannot apply to any other person who is not of that name. The cases cited on the other side do not apply for in all of them it was perfectly clear, from other circumstances, that the testator had mistaken the name. In this case that is by no means clear. In *Thomas* v. *Thomas*, the devise was to the testator's grand-daughter, *Mary Thomas*, living in *Merthyr* parish; *Mary Thomas* did not live in *Merthyr* parish, and was only his great grand-daughter, and there was a grand-daughter, who actually did live in that parish. In that case, therefore, the Court held the devise void for uncertainty. In this case it is contended, that the mistake in the name shall be a ground for setting aside *Stokeham H.* altogether, and introducing *John H.* In *Pitcairne* v. *Brase* it does not appear that there was any person of the name of *Charles Pitcairne*, the son of *William Pitcairne*. The same observation applies to the case in *Leonard*; there was no other corporation that answered the description mentioned in the will. Secondly, if this devise be void for uncertainty, the lessor will not be entitled to the property as heir at law, but *Cornelius*, the youngest son, will take.

Shadwell, in reply. The cases cited on the other side, are distinguishable from this, on the ground that here there is another person who answers the description of second son, which in the will, is applied to *Stokeham Huthwaite*

1820.

Doe *against* Huthwaite.

Huthwaite. In those cases, there was no other person answering the description. There was but one Lord *Evers*, and it does not appear, from the cases put in *Dyer*, that there was any person answering the description of son and heir of *J. S.*, or the wife of *J. S.* Here there is a person who corresponds completely with the description, and that description ought to be preferred to the name, because effect will thereby be given to the general intention of the testator. The same observation applies to the maxim veritas nominis tollet errorem demonstrationis, it assumes that there is an error in the description; here, on the contrary, the error is not in the description, but in the name.

Cur. adv. vult.

In the course of *Michaelmas* term, the Lord Chief Justice stated, that the Court had considered the case; and were of opinion, that evidence of the state of the testator's family, and other circumstances, was admissible, and that upon such evidence being given, the jury might find whether he had made a mistake in the name of the devisee or not. If no such evidence were given at the trial, it would then be a mere question of law as to the intention of the testator, to be collected only from the will itself; upon which the Judge must direct the jury, and it would be open to either party to tender a bill of exceptions. The Court, therefore, thought that there should be a venire de novo.

Venire de novo awarded.

1820.

YATES and Others *against* BELL and Others.

Tuesday, June 6th.

Where a bill of exchange, payable at the house of *A.* had been there presented for payment and dishonoured, and the acceptor afterwards remitted to *A.* a sum of money for the purpose of enabling him to pay the dishonoured bill, and also another of less value, and *A.* in answer stated the fact of the bill having been dishonoured, but added, that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill: Held, that the holder of the original bill could not maintain an action against *A.* there being no privity between them.

ASSUMPSIT for money lent and advanced, &c. Plea, general issue. At the trial at the *London* sittings, after last *Easter* term, before *Abbott* C. J., the following appeared to be the facts of the case. The plaintiffs were the holders of a bill of exchange, for 743*l.* 6*s.* 3*d.*, drawn by themselves upon, and accepted by *John Ingram*, and payable at the house of the defendants. The bill became due *July* 7th, 1819, and was, on that day, duly presented for payment, and dishonoured. On the 8th *July*, the defendants received a letter from *Ingram*, inclosing a bill for 800*l.*, which was as follows. "Gentlemen, &c., inclosed, you have a bill for 800*l.* to pay my acceptance, due the 7th, for 750*l.*, as also mine, for 37*l.* 18*s.* 6*d.*, due 8th; if you draw on me at 45 and 60 days, for 200*l.* each; they shall meet due honor." On the 9th, the bill for 800*l.* having been on that day returned accepted, the defendants wrote to *Ingram* as follows: "On the 7th instant, an acceptance of yours, for about 743*l.* was presented to us for payment; being without provision from you, we refused honor to it. We have now to advise receipt of yours of the 3d, remitting a bill of 800*l.* on *Puget* and Co., which has met honour, and, at maturity, shall be placed to your credit. We shall make up your account, and draw on you as you desire, for the balance." The defendants afterwards paid the bill of 37*l.* 18*s.* 6*d.*, mentioned in *Ingram*'s letter, but refused to pay that of the plaintiff, although it was again presented for payment, on the 8th *September*, 1819,

1820.

YATES *against* BELL.

after the bill for 800*l.* had been duly paid. During all these transactions, *Ingram* was indebted to the defendants, on the balance of the account in a sum exceeding 800*l.* Under these circumstances, *Abbott* C. J. was of opinion, at the trial, that the plaintiffs had no right oı action against the defendants, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. And now,

Marryat moved to set the nonsuit aside, and to enter a verdict for the plaintiff. The question is, whether this remittance created a trust in the defendants, for the plaintiffs, who were the holders of the bill, the remittance having been made for the express purpose of meeting it. The letter of the defendants, dated 9th *July*, does not amount to a repudiation of the trust; and even if it does, they had no right to repudiate the trust, and to retain the bill. If goods be sent to *A.* for the use of *B.*, no property vests in *A.*, but *B.* must bring the action for them. *Evans* v. *Marlett.* (*a*) *Sargent* v. *Morris.* (*b*) Besides, here the defendants have assented to the trust, by paying one of the bills, viz. that for 37*l.* 18*s.* 6*d.* The case of *De Bernales* v. *Fuller* (*c*) is in point, and *Williams* v. *Everett* (*d*) is distinguishable, because there was, in that case, no renewed application for payment, after the money had been received, as is the case here.

ABBOTT C. J. This case cannot, in principle, be distinguished from *Williams* v. *Everett*, and that case was

(*a*) 1 *Lord Raym.* 271. (*b*) *Ante*, 277.
(*c*) 14 *East*, 590. in note. (*d*) 14 *East*, 582.

pro-

properly decided. In *De Bernales* v. *Fuller*, the defendant was agent of *De Bernales* when he received the money, and never would have received it but for that character, and after that, he could not repudiate that agency. That is the distinction between the two cases. Where a party, to whom a bill is remitted, repudiates the trust with which the bill is clothed, that may give to the person remitting the bill a right to bring trover for it; but it does not give any right of action to the person to whose account the bill is directed to be applied, and unless some agreement had taken place respecting the bill between the defendants and the plaintiffs, the former could only be considered as holding the bill for the use of *Ingram*. It was so laid down by Lord *Ellenborough* in *Williams* v. *Everett*. (a) The nonsuit, therefore, was right.

Rule refused.

(a) 14 *East*, 597.

ANDREWS, Clerk, *against* DIXON, Esq., Sheriff of Worcestershire.

Tuesday, June 6th.

Where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of fi. fa. without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord.

JERVIS moved for a new trial in this case, which was tried at the *Guildhall* sittings after last *Easter* term, before *Abbott* C. J. The action was brought by the plaintiff, who was the landlord of certain premises, against the sheriff, for taking and selling the goods of the tenant under a writ of fieri facias, without retaining a year's rent, pursuant to the statute 8 *Ann. c.* 14. It

1820.

ANDREWS *against* DIXON.

appeared that the goods had been removed and sold under the execution between the 5th and 10th *January*, and that no notice was given till the 17th *January*, on the part of the landlord, of any rent being in arrear. But it appeared in evidence that the sale had been conducted with great secrecy and dispatch; and the learned Judge left it to the jury to say whether the sheriff knew of the fact that rent was in arrear, although no notice of it had been given to him before the sale. The jury found a verdict for the plaintiff; and the question was, whether the notice, after the sale, given to the sheriff was sufficient. He cited *Arnitt* v. *Garrett*, *ante*, 440., where the notice was given before the sale. Here it was not given till after that period.

Per Curiam. No specific notice is required by the statute. If, indeed, a sheriff has no reason to suppose any rent to be due, he will be protected in case he pays over the money to the execution creditor. Here, however, the extraordinary haste and secrecy of the sale shew that he did know of and expected a claim from the landlord. If after that he chooses to proceed, he is liable. The notice to the sheriff is only for the purpose of establishing beyond doubt his knowledge of the landlord's claim. If that knowledge can by any other means be brought home to him at any time before he has parted with the money, he will be liable.

Rule refused.

1820.

WATSON *against* ATKINS.

Tuesday, June 6th.

Where a party took seven-sixteenths of certain premises, the whole of which then were rated at the annual value of 35*l*., and the lessor covenanted to pay all taxes then chargeable on the premises, or any part thereof, or on the yearly rent thereby reserved, and the lessee covenanted to pay all *fresh* taxes which should thereafter be charged upon the premises, or any part thereof: Held, by *Bayley* and *Holroyd* Js., dissentiente *Abbott* C. J., that the true construction of these covenants was, that the lessor should pay such taxes as were chargeable on the premises at the time of making the lease, considering them as of the annual value of seven-sixteenths of 35*l*., and that the lessee should pay all fresh taxes, and all such additions to the taxes formerly chargeable, as were occasioned by the improved value of the premises.

COVENANT. The question depended on the terms of a lease from the defendant to *Samuel Burrows*, which had been assigned by *Burrows* to the plaintiff. The lease was dated *October* 23*d*. 1801, and was, for a period of twenty-three years, at a certain reserved rent. The premises demised formed part of larger premises, belonging to the defendant, and occupied by him, being about seven-sixteenths of the whole; and, at the time of the lease, the whole premises stood rated to the different taxes, &c. at the value of 35*l*. per annum. The covenants were as follows: "The said *Samuel Atkins* to bear and pay, during the continuance of the term hereby granted, all such taxes, charges, rates, assessments, duties, and impositions whatsoever, whether parliamentary, customary, or parochial, which are now payable or chargeable on the said premises, or any part thereof, or on the said yearly rent hereby reserved; and the said *Samuel Burrows* to bear, pay, satisfy, and discharge *all fresh taxes, charges, rates, assessments, fines, duties, and impositions*, whether parliamentary, customary, parochial, or otherwise howsoever, which shall or may at any time or times hereafter be taxed, rated, charged, or imposed upon the said premises hereby granted, or upon any part or parcel thereof." In the year 1804, *Burrows* improved the premises demised to him, and in 1813, assigned over his interest in them to the plaintiff. The plaintiff now

1820.

WATSON *against* ATKINS.

claimed the repayment of certain rates, taxes, and other charges, amounting to the sum of 46*l.*, and upwards, under the covenants above mentioned. At the trial, at the sittings in *Hilary* term last, before *Abbott* C. J., it appeared, that the part of the premises now occupied by the defendant, were now rated at the value of 35*l.* per annum alone, and that the plaintiff's and defendant's premises had been separately assessed at the time when the taxes, &c. for the recovery of which the action was brought, were paid by the plaintiff. The learned Judge being of opinion, that the covenant, by the lessor only, made him liable so long as the premises should continue *jointly* assessed, directed a nonsuit giving to the plaintiff liberty to move to enter a verdict for such sum, if any, as the Court should be of opinion he was entitled to recover. *Lawes* having, in last *Hilary* term, obtained a rule nisi to this effect,

Marryat and *Tindal* shewed cause. The question in this case is, whether the taxes imposed on the defendant's premises, are fresh taxes or not. It is contended, on the other side, that they are not, because they are only increased taxes, but still ejusdem generis with those payable at the time when the lease was granted. That would be, however, absurd, for it would lead to this consequence; that if the tenant so far improved the premises, as to make the taxes equal, or exceed the rent, he might not only not pay rent, but actually receive it from the landlord. This case must, at all events, be governed by the principle laid down in *Graham* v. *Wade*. (*a*) Besides, here the premises have

(*a*) 16 *East*, 29.

been

been separately assessed, and it may well be contended, that the true construction of this covenant is, that the lessor should remain liable only so long as the assessment continued to be jointly made. For the moment a separate assessment was made, that would be a fresh tax on the premises.

1820.

WATSON *against* ATKINS.

Lawes, contrà. In *Graham* v. *Wade*, there was a particular covenant, specifically providing for the case of improvements. But where, as here, there is none, the covenant will apply to the payment of all increased taxes, up to the amount of the rent reserved. If, however, that should not be so, still the plaintiff is entitled to the repayment of those taxes which are payable, on the proportionate value which his premises bore to the whole at the time of the lease, when the whole was of the annual value of 35*l.* This will entitle him to the repayment of the taxes chargeable on a rental of seven-sixteenths of 35*l.*, and this will not be liable to the inconvenience suggested in argument by the other side. And the separate assessments can make no difference. For it is not in the power of the plaintiff to procure a joint assessment to be made, it being the duty of the parish officers to rate each occupier separately.

ABBOTT C. J. I retain the opinion which I entertained at the trial, as to the construction of these covenants. The language of them is very obscure, and it seems not improbable that they are taken from a precedent not properly applicable to the present case. Whatever the Court may think as to this bargain being improvident or otherwise, ought to have no influence on their decision, which must be founded upon the meaning

1820.

WATSON *against* ATKINS.

of the words used by the parties. The circumstances are these: *Atkins* being in the occupation of premises, for the whole of which he was rated, demised part of them by a separate lease to *Burrows*. The consequence was, that as soon as possession was taken by him under the lease, it would be the duty of the parish officers to rate each party in respect of his separate occupation. Under these circumstances, the lessor covenants to pay, during the continuance of the term, all such taxes, rates, assessments, duties, and impositions, whatsoever, which were then payable on the said premises, or any part thereof, or on the rent thereby reserved; and that is followed by a covenant on the part of the lessee to pay all fresh taxes, &c. which might at any time hereafter be charged upon the premises. Now, in order to construe these two covenants, it becomes necessary to ascertain the meaning of the words "fresh taxes;" and undoubtedly, if a new house were erected, which would introduce a house and window-tax, they would be fresh taxes. But the question is, whether these words apply to an increase of the highway and parochial rates during the term. I think they do; for, in my opinion, the parties meant to say this, "what the consequence of this division may be we cannot say; but we stipulate, so long as the premises shall continue to be charged in one assessment, the landlord shall pay the whole; but if there be a fresh assessment in respect of the new occupation, the tenant shall be liable to that assessment." It is to be observed, that the word used here is "fresh," not "additional." I think, therefore, that the tenant is not entitled in the present case to any apportionment; but that, from the moment a fresh assessment was made upon him, he became liable to the whole of that assessment.

ment. Suppose, upon the subdivision of the property, the aggregate value had been increased; in that case, undoubtedly, if a separate assessment had been made, the landlord would be the gainer. But, on the contrary, if the aggregate value had been increased, and the assessment had remained joint, he would have been a loser. I think, therefore, that the only risk contemplated by the parties was whether there would be a joint assessment or not. Under the circumstances of this case, I think that the payments made by the tenant came within the words "fresh taxes," and that he has no right to call upon the landlord to bear any part of them. The nonsuit was therefore right.

BAYLEY J. I agree that whatever might have been the intention of the parties, they could hardly have expressed it in more obscure language. But the fair result seems to be this, that by the agreement the lessee is entitled to receive from the lessor a certain proportion of the rates and taxes, which, subsequently to the agreement, might be imposed upon the premises demised, which appear to have been seven-sixteenths of the whole. The parties seem to have considered the whole premises as rateable at 35*l.* per annum, and to have agreed that for the future the lessor should pay to the lessee the rates and taxes chargeable upon premises of the value of seven-sixteenths of 35*l.* per annum. It appears that the premises were leased for 23 years; and that the lessor covenanted to pay the taxes then payable, and the lessee all fresh taxes. Now, each of these covenants controuls the other; and at the period when they were entered into, nothing was payable for these premises per se. They were then assessed as part

of

1820.

WATSON *against* ATKINS.

of a larger estate, and the rate upon them was an aliquot part of a larger sum charged upon the whole. As soon, however, as they were separated, it became the duty of the overseers to make separate assessments, and to discontinue the old mode of making assessments jointly, and the lessor would have a right to insist upon this being done; and if so, he might, by procuring separate rates, defeat his own covenant. If, on the contrary, the parish officers were prevailed on by the tenant to rate the whole premises jointly, it would follow that whatever might be the improvements made by him, he would not be chargeable with the payment of any taxes in respect of such improvements. Such a construction, therefore, as it seems to me, ought not to be adopted. The construction, I think, is this, the party occupies seven-sixteenths of certain premises rateable at the value of 35*l.* per annum, and covenants to pay the taxes then chargeable. Now, the taxes then chargeable are the taxes chargeable upon premises then of the annual value of seven-sixteenths of 35*l.* The duration of the lease corroborates this view of the case; for it could hardly be expected by any person that the value of the premises would not vary, or that they would continue jointly rated during the whole space of 23 years. We ought, therefore, in construing this covenant, to consider the premises as upon the parish rates at 35*l.* per annum, seven-sixteenths of which burden the lessor is to bear. This view of the case will be consistent with the whole agreement, and will give to neither party any improper advantage. I think, therefore, that the rule for entering a verdict for the plaintiff must be made absolute.

HOLROYD

HOLROYD J. I agree with my Brother *Bayley*, in the view which he has taken of this case. The lessor does not covenant to pay the taxes then paid or charged, but such as are payable and chargeable. The covenant, therefore, extended to all such taxes as were liable to be paid in respect of the premises, whether jointly or separately assessed. It was the duty of the parish officer to make separate assessments, and that is a strong circumstance to shew what must have been the intention of the parties in framing these covenants. The lessee's covenant only extends to the payment of fresh taxes, charged upon the premises; and the proper construction of it seems to me to be this, to hold, that it extends either to new taxes, or to such additional or further taxes as might be imposed in consequence of any improvement of the premises. But I think that the covenant ought not to be so construed as to make it depend on the misconduct of third persons, whether the lessor be or be not chargeable. I entirely agree, therefore, with my Brother *Bayley*, in thinking, that the lessor ought to pay such rates and taxes as are chargeable in respect of seven-sixteenths of premises, the whole of which are of the annual value of 35*l*. I think, therefore, that the rule should be made absolute to that extent.

Rule absolute accordingly. (*a*)

(*a*) *Best* J. was absent from indisposition.

1820.

SANFORD and Others *against* IRBY and Others.

A testator having an estate, which had been conveyed by the settlement on his first marriage to trustees to the use of himself for life, remainder to his first and other sons successively, in tail male, and having one son and two daughters by his first marriage, shortly after his second marriage made his will, and devised to his son all his manors, &c. and personal property, subject to the payment of his debts and legacies; but in case his son should depart this life without issue male, or in case of failure of issue male of testator's body, he bequeathed to all and every his daughters who should be living at the time of his death, or born in due time afterwards, 40,000*l.* equally to be divided amongst them, in addition to what they might be entitled to under the marriage settlements of their respective mothers; and if only one daughter, then he bequeathed 20,000*l.* to her; he then charged his estates with the payment of these sums, and devised them to *A.* and *B.*, their heirs, &c. without impeachment of waste upon trust by sale or mortgage, to raise a sufficient sum to pay those legacies with interest; and he then devised the remainder of his manors, lands, &c. as should not be sold by the trustees for that purpose, for want or in failure of issue male of his body as aforesaid, unto his brother for life, with different remainders over. The testator had no children by the second marriage, and his only son by the first marriage having died under age unmarried, and without issue: Held, that the surviving daughters took no estate by descent in the hereditaments devised by the will; and, secondly, that if the devise to *A.* and *B.* had been of a power to raise money by sale, and not of a legal estate, that the testator's brother would have taken an estate for life with remainders over; and, thirdly, that under the will *A.* and *B.* took an estate in fee.

THE following case was sent by the Vice Chancellor, for the opinion of this Court:

Sir *William Langham* late of *Cottesbrooke* in the county of *Northampton*, Bart. deceased, in or about the month of *August*, 1795, married *Henrietta Elizabeth Frederica Vane*, and by his marriage settlement he conveyed certain estates to trustees to the use of himself for life, with remainder to the use of his first and other sons, successively, in tail male, remainder to himself in fee. The marriage settlement contained a power of raising 15,000*l.* for the portions of younger children. By this marriage he had three children, *William Henry Langham*, since deceased, and the plaintiffs, *Henrietta Sanford* and *Charlotte Langham*. Sir *William Langham*, afterwards, in *May*, 1810, married, for his second wife, *Augusta Priscilla Irby*, one of the defendants, and by his will, dated the 1st *February*, 1811, devised as follows: "I give and bequeath to my son *William Henry Langham*, his heirs, executors, and administrators, all my

1820.

SANFORD *against* IRBY.

my manors, messuages, lands, tenements, and hereditaments, and real estates, and also all my personal estate, (including any jewels I may be possessed of at the time of my death,) except pearls, and also except lace, whatsoever and wheresoever, subject nevertheless to the payment of all my just debts, legacies, &c. But in case my said son *William Henry Langham* should depart this life without issue male, or in case of failure of issue male of my body, I give and bequeath unto all and every my daughters who shall be living at the time of my death or born in due time after, the sum of forty thousand pounds, in addition to what they may become entitled to under the marriage settlements of their respective mothers, equally to be divided amongst them, share and share alike, and if only one daughter, then unto such only daughter the sum of 20,000*l.*" The testator then charged his estates with the payment of these sums, and for that purpose bequeathed his estates unto *William Ayshford Sanford* and *William Jones Burdett*, Esquires, their heirs and assigns, without impeachment of waste, upon trust, by sale or mortgage of a competent part of such estates, (except his mansion house at *Cottesbrooke*, and the park, lands, and hereditaments held therewith,) to raise and levy such sums as would be sufficient for that purpose; and upon trust, out of the rents and profits of his estates, to pay interest after the rate of 4 per cent. per annum, for the several legacies to be computed from the end of six calendar months after his death. And he then devised as follows: I give and devise the residue, or such part or parts of all and every my manors, messuages, farms, lands, tenements, hereditaments, and real estate, as shall not be so sold or mortgaged for the purpose aforesaid, for want or in failure of issue

male

1820.

SANFORD *against* IRBY.

male of my body, as aforesaid, unto my brother *James Langham* for and during his life, and from and after the determination of that estate, by forfeiture, surrender or otherwise in his life-time, I give and devise the same premises unto the said *William Ayshford Sanford* and *William Jones Burdett*, and their heirs during the life of my said brother, in trust to preserve the contingent remainders, and from and immediately after the decease of my said brother, I give and devise all and every my said manors, messuages, farms, lands, tenements, hereditaments, and real estate unto the first son of the body of my said brother *James Langham*, lawfully begotten, and the heirs male of the body of such first son, lawfully issuing, and for default of such issue, unto the second, third, fourth, and all and every other the son and sons of the body of my brother *James Langham*, lawfully begotten, severally and successively, and in remainder one after another in order and course as they and every of them shall be in seniority of age and priority of birth, and to the several and respective heirs male of the body and bodies of all and every such son and sons respectively issuing, the eldest of such sons and the heirs male of his body issuing, being always to be preferred, and to take before the younger of such sons, and the heirs male of his or their body or bodies issuing, and in default of such issue male, I give and devise all and every my said manors, messuages, farms, lands, tenements, hereditaments, and real estate unto my own right heirs for ever." And after giving the said *James Langham*, when in possession, the usual power of making leases, the said testator gave, bequeathed, and devised in the words following; viz. "And in case I shall leave no son, or leaving one son he shall afterwards die,

1820.

SANFORD *against* IRBY.

die, without leaving issue, before his age of twenty-one years, then I give and bequeath all my plate, jewels, household goods, household furniture, pictures, deer, live and dead stock, in and about my said mansion-house at *Cottesbrook* aforesaid, at the time of my death, and all other my personal estate (except pearls and lace,) subject to the payment of my debts, legacies, and funeral expences, unto my said brother *James Langham*, for and during his life and from and after his decease unto such son of my said brother, who shall first attain the age of twenty-one years. But in case there shall be no such son of my said brother, who shall attain the age of twenty-one years, then I give and bequeath the same unto all my daughters, if I shall leave more than one, equally to be divided amongst them, share and share alike; and if I shall leave only one daughter, unto such one daughter. Sir *William Langham* died on or about the 8th day of *March*, 1812, without having altered or revoked his said will, leaving his widow, *Augusta Priscilla Langham*, *William Henry Langham*, his only son and heir at law; and the said plaintiffs, *Henrietta Sanford*, and *Charlotte Langham*, his only other children, surviving him. Sir *William Henry Langham*, Bart. his son, died on or about the 12th day of *May*, 1812, an infant intestate, unmarried, and without issue, leaving the said plaintiffs, *Henrietta Sanford* and *Charlotte Langham*, his only sisters, his co-heiresses at law, and only next of kin surviving. The defendant, Sir *James Langham*, had issue one son, viz. the defendant *James Hay Langham*, who was still alive. The questions for the opinion of this Court were, 1st. Whether the said plaintiffs, *Henrietta Sanford* and *Charlotte Langham* took any and what estate by descent in the here-

dita-

1820.

SANFORD *against* IRBY.

ditaments devised by the will of the said testator Sir *William Langham*, in the pleadings mentioned, as his heirs general, or as heirs general of Sir *William Henry Langham*, his son: 2dly, Whether if the devise to *William Ayshford Sandford* and *William Jones Burdett*, had been of a power to raise money by sale or mortgage, and not of a legal estate, the defendants, Sir *James Langham* and *James Hay Langham* respectively, would have taken any and what estate in the hereditaments devised by the will of the said testator Sir *William Langham*; and, 3dly, Did *William Ayshford* and *William Jones Burdett* take any and what estate in the hereditaments devised to them by the said will of Sir *William Langham*. The case was argued in *Michaelmas* term 1818, by *Richardson* for the plaintiffs, and *Shadwell* for the defendants.

Argument for the plaintiffs. The two daughters of Sir *William Langham* in this case took a fee, the remainder over to Sir *James Langham* being void as being too remote. The circumstances under which the testator stood were these. He was a Baronet, and the estate stood limited by his marriage settlement to himself for life, remainder to his eldest son in tail, reversion to himself in fee, and at the time when he made his will, being recently married, for the second time, he might naturally expect to have other sons born. By the will he gives a fee to his eldest son, which for this part of the argument, may be assumed to be by the subsequent words of the devise, cut down to an estate tail. The words of the devise are: In case my son *William Henry Langham* shall depart this life without issue male, or in case of failure of issue male of my body, I give and bequeath, &c. (and then

1820.

SANFORD *against* IRBY.

then after limiting portions to the daughters, he adds), and for want, or in case of failure of issue male of my body as aforesaid, unto my brother *James Langham*, &c. Now here the remainder over is too remote, because it is limited over, not merely on the failure of issue male of *William Henry Langham*, but also on failure of issue male of the testator. It is limited on the failure of issue entirely unconnected with the estate given; and, therefore, unless an estate tail can be raised by implication in such issue, viz. in the after-born sons of Sir *William Langham*, the devise over to Sir *James Langham*, will be void. It cannot be supposed that the testator's intention could have been, that in case he had male issue by his second marriage, these sons should not take in preference to his brother. The words, therefore, in failure of issue male of my body, must clearly apply to after born sons. The circumstances which have since actually happened, can make no difference in construing this will, for it is a rule of law, that a limitation over which in its terms is too remote is still void, although by the course of events it may subsequently appear that the intention of the testator might, without violating any rule of law, have been carried into effect; that is laid down in the argument in *Wicker* v. *Mitford*, by *Hargrave*, which is to be found in *Fearne*, p. 414. The case of Lady *Lanesborough* v. *Fox* (a), is scarcely to be distinguished from this. There the words were, "I give and devise the manor and town of *L.* &c. mentioned and contained in the settlement made by me, on the marriage of my son *James Lane*, in failure of the issue of the body of the said *James Lane*, and for want of

(a) *Cas. Temp. Talbot*, 262.

 heirs

1820.

SANFORD *against* IRBY.

heirs male of my body, to my daughter *Frances Lane*, and the heirs of her body." It was there held, that no estate tail could be raised by implication in the unborn sons of the testator, and consequently that the devise over to the daughter was void. So here no such estate tail can be raised by implication in the after-born sons of Sir *William Langham*, in order to support the devise over to Sir *James Langham*. *Moor* v. *Parker* (*a*), and *Jones* v. *Morgan* (*b*), are authorities in support of this proposition. The case of *Tenny* v. *Agar* is unboubtedly the other way. But that case stands alone, and the case of *Lanesborough* v. *Fox*, has hitherto been considered as one of the land-marks of the law on this subject. Secondly, it may be contended that under this will Sir *William Henry Langham* took an estate in fee. The words of the will are expressly so. It is, however, contended that the subsequent part cuts this down to an estate tail. But judging from the probable intention of the testator, it cannot be so. Under the first settlement, Sir *William Henry Langham* took an estate tail. Then, if so, the will would give him nothing, unless he took a fee under it. If he took a fee, the limitation over to Sir *James Langham* is clearly too remote, and is void.

For the defendants. Upon the face of the will this limitation may be supported; for there is good ground for contending that the testator contemplated only the failure of issue male of his body at the time of his death, exclusively of his son Sir *William Henry Langham*. The devises over to trustees to raise the sum of 40,000*l.* for the daughters, and to pay debts, &c.

(*a*) 4 *Modern*, 316. (*b*) *Fearne*, 588.

being

1820.

SANFORD *against* IRBY.

being devises in favour of persons then in esse, are strong to shew that the words "in case of the failure of issue male of my body" are so to be restrained; *Wellington* v. *Wellington* (*a*), *French* v. *Caddell* (*b*), and *Lytton* v. *Lytton* (*c*), are authorities in point. These cases shew that, consistently with the rules of law, it may be held that here the testator intended to devise, not upon a general failure of issue male, but upon a failure of such issue at the time of his death, exclusively of his son, Sir *William Henry Langham*. It is sufficient, however, if the Court hold that the devise over to Sir *James Langham* was to take effect in case of the failure of issue male of the testator, at the time of the termination of the vested estate-tail in Sir *William Henry Langham*. And no doubt can be entertained that in case a testator devises to an eldest son in tail male, and upon the termination of that estate, if there be no issue male of his own body, then over to his brother, it would be a good contingent remainder. And that may be collected to be the meaning of the words used by the testator in the present will. But supposing that not to be the construction of the words "in case of failure of issue male of my body," still, if it be necessary, the Court may and will raise estates tail by implication in the after-born sons of Sir *William Langham*, in order to make the devise over good, in this case. The language of Lord *Mansfield*, in delivering the judgment of the Court in *Jones* v. *Morgan* (*d*), is strong in favour of this view of the case; and *Tenny* v. *Agar* (*e*) is quite in point. It

(*a*) 4 *Burr.* 2165.
(*b*) 6 *Bro. Parl. Cas.* 58.
(*c*) 4 *Bro. Ch. Rep.* 441.
(*d*) *Fearne*, 588.
(*e*) 12 *East*, 253.

1820.

SANFORD *against* IRBY.

is said, however, that this is at variance with *Lanesborough* v. *Fox*, and *Moor* v. *Parker*. But as to the latter case this point was never decided, as it appears from the report both in *Skinner* and in Lord *Raymond*, that the case was adjourned. As to *Lanesborough* v. *Fox*, it was quite unnecessary to decide the point; for either *James Lane* had an estate tail or not; if he had, the remainder over was barred by the recovery which he had suffered; if not, the devise over was void; and so, either way, the question might have been decided at once. And the persons who argued that the limitation was not too remote were in fact estopped from raising the question whether in that case there was any estate tail raised by implication. And that case was argued solely upon the intention of the testator not to give more than a life estate to *James Lane*. Here, upon the intention of the testator there can be no doubt. This intention clearly was to give to his brother, Sir *James Langham*, to whom, in the event of his not having male heirs of his own body, the title would descend, the estates in question, in order to support that title. This is clearly a devise which ought to be supported, and there is no rule of law to the contrary.

Argument in reply. The observation, that the words "in case of failure of issue male of my own body," apply to a failure at the time of the testator's death, can only be relied on in case it appears that Sir *William Henry Langham* took only an estate tail. For if he took an estate in fee, an executory devise over on failure of issue male of Sir *William Henry Langham* will clearly be too remote. Now, for the reasons before stated, it does appear that Sir *William Henry Langham* took an estate in

fee

fee under the will. Nor, indeed, can it be fairly inferred from the will that the argument as to the construction of those words is well founded; for in a subsequent part of the will Sir *William Langham* devises over to his daughters his personal property at a time probably to be long subsequent to his own death, being not only after his own death, but also after that of his son and his issue under twenty-one, and of his brother and his issue under twenty-one. The devise of the legacies to his daughters is, therefore, an imperfect criterion of his intention; and as to the payment of debts, funeral expences, &c. the devise to the trustees for that purpose was to take effect before any other estate devised by the will. No reliance can, therefore, be placed on those parts of this will. Upon the other point, whether estates tail can be raised by implication in persons to whom no estates were given by the will; the case of *Tenny* v. *Agar* stands alone. It was not necessary to have decided the point in that case. It is said that this observation also applies to *Lanesborough* v. *Fox;* but in that case the point is expressly and distinctly adverted to; and it has always since been considered as the leading case on the subject; and neither that authority nor *Moor* v. *Parker* were cited in *Tenny* v. *Agar*.

Cur. adv. vult.

The following certificate was afterwards sent.

We have heard this case argued by counsel, and have considered it, and are of opinion; 1st, That the said plaintiffs, *Henrietta Sanford* and *Charlotte Langham*, take no estate by descent in the hereditaments devised by the will of the said testator, Sir *William Langham*,

1820.

SANFORD against IRBY.

in the pleadings mentioned, as his heirs general, or as heirs general of Sir *William Henry Langham*, his son; secondly, if the devise to *William Ayshford Sandford* and *William Jones Burdett* had been of a power to raise money by sale or mortgage, and not of a legal estate; we think that the defendants, Sir *James Langham*, would have taken an estate for his life, and *James Hay Langham* an estate in tail male to him and the heirs male of his body in the hereditaments devised by the will of the testator, Sir *William Langham*; thirdly, We think that *William Ayshford Sanford* and *William Jones Burdett* took an estate in fee-simple in the hereditaments devised to them by the said will of Sir *William Langham*.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.

Wednesday, June 7th.

DOE, on the Demise of GRIMES and Others, Assignees of HAMMOND, a Bankrupt, *against* GOOCH.

Where a builder, having taken ground on a building lease at the ground rent of 108*l.*, assigned over his lease to *A.* for a sum considerably exceeding the then value of the premises, and at the same time took a lease from *A.* at an increased rent of 395*l.*, and containing the same covenants for building as the original lease, together with a stipulation of being allowed to repurchase the lease at the same sum for which it was assigned by him to *A.*: Held, that under these circumstances, it was properly left to the jury to say whether this was a purchase or an usurious loan; and the jury having found it to be the latter, the Court refused to disturb the verdict.

EJECTMENT for four houses, situate in the parish of *St. James, Clerkenwell.* At the trial at the *Guildhall* sittings after last *Easter* term, before *Abbott* C. J.,

it

1820.

DOE *against* GOOCH.

it appeared that a certain portion of land upon which the carcase of one house was then built, and on which the other houses were subsequently erected, was, on the 1st of *August*, 1816, demised on a building lease, by a person of the name of *Read*, to the bankrupt, *Hammond*, for a term of 99 years, at the rent of 108*l.* per annum. On the 16th *August*, 1816, *Hammond* assigned over this lease to *Roberts*, for the sum of 2300*l.*, and an agreement was entered into, dated 17th *August*, 1816, by which *Hammond* agreed to take the premises from *Roberts*, subject to the same covenants as to building, &c. as were contained in the original lease to him; but at an increased yearly rent of 395*l.* The agreement contained a stipulation that *Hammond* should be at liberty, upon giving six months' notice, to repurchase the lease for the sum of 2300*l.* Both the assignment and the agreement, although dated on two successive days, were in fact executed at the same time, and formed one transaction. It was also proved that the buildings, &c. had been valued shortly previous to this transaction at the sum from 700*l.* to 800*l.* only, and that a large sum of money would necessarily be required to be expended in the completion of the houses. *Hammond*, under this agreement, subsequently completed the houses, and having become bankrupt, this action was commenced by his assignees against the defendant, whose claim to the premises was derived under the assignment to *Roberts.* The learned Judge, at the trial, left it to the jury to say whether the transaction between *Hammond* and *Roberts* was substantially a purchase or a loan, and told them that if they thought it was a loan the deeds were void, the transaction being usurious. The jury

 found

1820.

Doe *against* Gooch.

found a verdict for the lessors of the plaintiff. And now

Scarlett moved for a new trial. Upon the face of the deeds themselves it is a purchase; and, therefore, unless evidence dehors the deeds be resorted to, the jury ought not to have inferred usury. Here the principal money was altogether gone, unless *Hammond* chose to redeem; and though it might be his interest so to do, yet that will not make it an usurious transaction. If a person have an annuity secured on a freehold estate, it may be clearly his interest to redeem it; but such a power will not make the bargain usurious. [*Bayley* J. in that case the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received.] Here it is the mere bargain of a builder, who is desirous of dividing the risk of the speculation with another man. In *Rex* v. *Drury* (a) this very question, seems to have arisen. There *Drury* advanced to *Drue* 300*l.*, and made a similar agreement as here, that *Drue* should pay him 30*l.* per annum rent, with a liberty to repurchase on payment of 300*l.* at the end of four years; and Lord *Hale* held that not to be usurious. In *Doe* v. *Chambers* (b) there was evidence to shew, independently of the deeds themselves, that the transaction was in the nature of a loan. But here there was no such evidence.

(a) 2 *Lev.* 7. (b) 4 *Campb.* 1.

ABBOTT

Abbott C. J. I cannot agree that in this case there was no evidence, independently of the deeds, to shew that this was a transaction in the nature of a loan. The original lease from *Read* to *Hammond*, which was dated *August* 1st, 1816, contained a reservation of a ground rent of 108*l*., and a covenant that *Hammond* should complete the four houses in question. This lease *Hammond* assigned to *Roberts* for the sum of 2300*l*., and then he took from *Roberts* a lease at 395*l*., being nearly 200*l*. per annum more than the original ground rent reserved; and in that agreement there was a stipulation that *Roberts* should reassign on being repaid the sum of 2300*l*. These instruments, dated on successive days, were executed together; and it appeared in evidence that the buildings in respect of which 2300*l*. was so advanced, were not at that time worth more than 1000*l*. The question which, under these circumstances, I left to the jury, was, whether this was a purchase or a loan. If the latter was the case, then, whatever might be the form given to it by the parties, it will not vary the real nature of the transaction, nor prevent it from being usurious. The circumstances of *Roberts* purchasing for 2300*l*., premises, which were not of more value than 1000*l*., and of his undertaking the further expence of building, which latter burden was immediately shifted from him to *Hammond* by a lease, executed at the same time, on which a rent of 395*l*. was reserved, appeared to me strong circumstances upon which the jury might properly found their present verdict. And under the terms of the agreement I thought that *Hammond* would necessarily be compelled to repurchase. The case of *Rex* v. *Drury* is distinguishable from the present. There the lessee, *Drue*, was not bound

1820.

Doe against Gooch.

bound to do any thing beyond the payment of the rent; but here *Hammond* was bound not only to pay the rent, but to go on to complete the buildings at a considerable additional expence. I think there was sufficient evidence for the jury in this case, and I see no grounds for disturbing their verdict.

Rule refused.

Thursday, June 8th.

The King *against* Parkyns and Others.

On the charter day for the election of lord-mayor of the city of *London*, the business of the election ought to have precedence of all other matters; and therefore it is not lawful, after the lord-mayor and aldermen have retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether.

THE Solicitor-General, in last *Michaelmas* term, had obtained a rule nisi for a criminal information against the defendants, for having, on the last charter day (29th *September*, 1819) for the election of the lord mayor of the city of *London*, obstructed that election in a violent and tumultuous manner. The custom, as to the election of lord mayor, as stated by the affidavits, was as follows: The livery of the different companies within the city, are summoned every year to attend at *Guildhall*, on the 29th day of *September*, or on the day preceding, in case the 29th of *September* shall happen to fall on a *Sunday*, for the election of a lord mayor for the year ensuing, by precepts issued previously for that purpose by the lord mayor, by an order of a court of aldermen, and directed to the master and wardens of the several livery companies of the city of *London*. On the morning of the election day in every year, the lord mayor, recorder, and aldermen, with the sheriffs and other officers of the city, after having met together in the council chamber at *Guildhall*, and proceeded from thence to church, return again to *Guildhall*, for the purpose of the election; immediately upon their return, the lord mayor, re-

corder,

corder, aldermen, sheriffs, and other city officers, being seated in their respective situations, on the place where the court of hustings is usually held, the town clerk dictates to the common crier a proclamation to the following effect, that is to say: "You good men of the livery, of the several companies of this city, summoned to appear here this day, for the election of a fit and able person to be lord mayor of this city, for the year ensuing, draw near, and give your attendance. God save the king." Which proclamation the common crier makes. The recorder then advances towards the front of the hustings, and informs the persons of the livery who are assembled, that they, of old custom, know the cause of their assembly and meeting together, is for the purpose of returning two fit and able persons to the lord mayor and aldermen, for one of them to be chosen lord mayor for the year ensuing. The course then is, that the present lord mayor, recorder and aldermen, retire to an inner chamber, and there remain, with the doors closed, until the election be brought to them, leaving the common serjeant, the sheriffs, the town clerk, and other city officers, in the place where the court of hustings is usually holden to carry on the election. The common serjeant then states, shortly to the livery, to the effect of what the recorder has before said, and to put them in mind of the order they are to use in their election; that is to say, that he, the common serjeant, will have to read over to them the names of those aldermen who have served the office of sheriff, and have not served the office of lord mayor; after which, the said names will be put to them, separately, by the common cryer, and then, and not until then, they will be required to hold up their hands, for shewing

upon

1820.

The King *against* Parkyns.

upon which two of the said aldermen their election might fall, and which two persons are to be returned to the lord mayor and aldermen, for their choice of one of the said two persons, to be lord mayor for the year ensuing. The election then proceeds, and it is the practice to exhibit the names of the several aldermen on a board, as they are respectively named for such election, in order that the same may be the more distinctly known to the livery assembled in the hall. When the two persons have been so nominated, the common serjeant, with the sheriffs, chamberlain, town clerk, and other city officers, go to the lord mayor and aldermen, and there present the names of those two whom the commons have nominated, in their election, of whom the lord mayor and aldermen, by scrutiny, elect one, and afterwards come back to the place where the court of hustings is usually holden, when the recorder states to the livery the name of the one whom they have elected, after which, proclamation is made of the alderman so elected to come forth, and declare his consent to take upon himself the office; and if he is then present, and consents thereto, he is invested with the chain of office by the sword bearer, and the election is completed. On *Michaelmas* day last, the livery assembled, and after the lord mayor, recorder, and aldermen had taken their seats on the hustings, and as soon as the common crier had opened the hall, a considerable noise and tumult took place, during which time, the recorder addressed the livery; and the lord mayor, recorder, and aldermen then retired to the common council room. Upon the common serjeant's coming forward with the sheriffs, in order to proceed with the election, there was a great press on the hustings, in the course of which

1820.

The KING against PARKYNS.

which the defendants came forward, and (the common serjeant having in consequence retired) addressed the livery, and proposed and carried some resolutions relative to the transactions at *Manchester*, on the 16th of *August*, 1819. After these resolutions had been carried, in the course of which great noise and tumult took place; the election was allowed to proceed, and did proceed in the accustomed mode. The affidavits contained charges of previous arrangements, for the purpose of carrying on, and violent personal conduct in the course of these proceedings on the part of the several defendants. These latter circumstances were all expressly denied by the defendants; but they admitted that they had come forward to address the livery, and to propose the resolutions, contending that they had a right so to do. As to this point, their affidavits stated that it was their belief, and that of the general body of the livery, founded on an opinion formerly given by Serjt. *Glynn*, then recorder of *London*, that it was their inherent and undoubted right, when legally assembled in common hall on the 29th *September*, or on any other day, to discuss public grievances; and that several requisitions respectably signed, having been delivered to *John Atkins* Esq., the lord mayor, to call a common hall for the purpose of discussing public measures, which had been all refused, contrary to the usual practice, great dissatisfaction had arisen; that on the day in question, upon the recorder coming forward to the common hall there was a general cry of "No election, grievances first;" and that after the lord mayor and aldermen had retired, the resolutions were proposed, put, and carried. They further stated, that there was no intention of preventing the election, and adduced several instances in which similar

1820.

The King *against* Parkyns.

similar resolutions had on former occasions been proposed and carried. These were ten in number; the earliest being on *Midsummer-day*, 1769. In five of the instances resolutions unconnected with the election had been passed previously to it, and on the remaining five the resolutions appeared to have been passed subsequently to the election.

Brougham, *Denman*, *Holt*, *Chitty*, and *R. Scarlett*, shewed cause. Here the defendants were only in the exercise of a legal right. This right is a necessary one to the defence of the privileges of the livery; for the power of calling common halls being entirely in the discretion of the lord mayor, the right of the livery to meet and petition for the redress of grievances, might be entirely destroyed by his refusal to call a common hall. On *Midsummer* and *Michaelmas* days, however, the lord mayor is obliged by charter to convene the livery, and, therefore, on these days the livery have the opportunity afforded them of meeting and passing resolutions similar to those in the present instance. But this is not alone sufficient, for the passing the resolutions before the election, is a right also necessary to the exercise of the privilege of petition. For the lord mayor has the power of dissolving the hall, and, therefore, he might in this instance, as soon as the election had ceased, dissolve the hall, and so defeat the right of petitioning altogether. In order, therefore, to retain the perfect possession of the right of petitioning, it is necessary that the right now claimed, should also exist. Undoubtedly, however, it must be exercised with discretion; it must not be so exercised as to endanger the election, which is the proper business of the day. But the law considers corporations

1820.

The KING against PARKYNS.

porations as vested with a discretion. Many instances have been produced in which this right has formerly been claimed and exercised. The livery derive it from the origin of their constitution. For the common hall, which is no other than the ancient folkmote of the *Saxons*, was, in fact, anterior to the existence of the lord mayor as the head of the corporation. *Spelman's* Glossory, tit. *Folkmote;* and in *Bohun's* rights and customs of *London*, the common hall is mentioned as one of the courts of the city. The right claimed is somewhat similar to a refusal by the commons to grant the supplies till certain grievances are redressed. In that case the ultimate refusal of the supplies is not contemplated, but it is used as a means of redress. So here, the ultimate endangering the election was not contemplated by the defendants, and, in point of fact, it never was endangered in the least. It may be admitted, that in case any violence had been committed, the case would be otherwise, but that is completely answered by the affidavits. In the cases which have before occurred, violence was charged upon the defendants, that was the case in *Rex* v. *Pilkington* and *Others* (*a*), in *Rex* v. *Sacheverel* and *Others* (*b*), and in *Regina* v. *Soley*. (*c*) In *Rex* v. Sir *R. Atkins* (*d*), the distinction is pointed out between a riot and a disturbance under claim of right. And in *Francis Jenks's* case (*e*), where no violent act was charged, but only a speech made at the common hall; it does not appear that even in those profligate times the crown ventured to prefer an indictment against him. But at all events, even if the defendants have

(*a*) 9 *State Trials*, 187. *Howel's* ed. (*b*) 15 *State Trials*, 1. *Howel*.
(*c*) 2 *Salk*. 594. (*d*) 3 *Mod*. 22.
(*e*) 6 *St. Tri*. 1190.

infringed

1820.

The King *against* Parkyns.

infringed the law, they have not acted from improper, but mistaken motives; and, therefore, this Court will not interfere, but leave the prosecutors to their remedy by indictment. The authority of Mr. Serj. *Glynn* would naturally induce them to act on his opinion.

The *Solicitor General*, *Scarlett*, *Gurney*, and *Tindal*, contrà, after observing that they left the latter part of the argument of the defendant's counsel entirely to the Court, and that they were anxious only to have a judgment on the right claimed, proceeded to state, that Mr. Serj. *Glynn*'s opinion had been over-ruled by the judges in *Plumbe*'s case. It is so laid down by *Ashhurst* J. p. 31.; by *Aston*, J. p. 88.; by the Lord C. Baron, pp. 101. 106.; and by *De Grey* C. J. p. 167. (*a*). They were then stopped by the Court.

Abbott C. J. I am of opinion, considering the peculiar nature of this assembly, and the purpose for which it was met, that it was not competent to them to go into any other matter previously to the election. The course is this, the whole body corporate are to meet together after divine service, and being met, the recorder addresses the livery, and propounds to them the object for which they are called together, and that being done, the lord mayor and aldermen retire into a separate chamber, in order that the meeting may proceed to the election of two persons, who are to be presented to the court of aldermen for their choice of one to the office. Now, if

(*a*) These references are to the report of *Plumbe*'s case, published in 1782 by Mr. *Roberts*, then city solicitor, by order of the common council. It contains the arguments of the four Judges, accompanied by a commentary of the editor.

ante-

1820.

The KING *against* PARKYNS.

antecedently to the election by the livery, and in the absence of the lord mayor and aldermen, it were to be permitted to propose any one matter as a subject for discussion, no person can say why other matters might not equally be submitted to their consideration, in which case the election might be deferred or altogether prevented. It does, therefore, appear to me, that where a part of the corporation are left by themselves for the exercise of a particular duty, the going into any other matter is inconsistent with the purpose and object for which the body corporate are then met. Much has been said in argument respecting this being the ancient custom and usage of *London*. The earliest instance of the exercise of such a power was in the year 1769, a date much too recent to be a foundation for an ancient custom. As to the instances between that period and the present, half of them were discussions antecedent, and half subsequent to the election; and I think that they are by no means sufficient to establish, by way of custom, a right to do a thing inconsistent with the object for which the livery were then left together, and which may have the effect of preventing the election altogether. I forbear to say any thing on the general question. My opinion is confined to the claim of right on the part of the livery, at this particular time when the lord mayor and aldermen have withdrawn, to enter into any other matter unconnected with the election. It does not appear to me that that is established by the affidavits laid before us, or the instances to which those affidavits refer. But although we may think that the defendants had no legal right to insist upon this claim, yet as they might have reasonable ground for supposing

 that

1820.

The King *against* Parkyns.

that they had the right, it does appear to me that this rule ought to be discharged.

Bayley J. I am of the same opinion. It is a general rule in corporation law, that the election of the head officer must take place on a given day. Now, on the charter day the members of the corporation have a right to expect that the election will take place, and that no other business will be interposed until that has been completed. If one subject of discussion may be interposed, many may, and so the day may ultimately be exhausted, and the election defeated. It has been said that if this right be not allowed, other rights possessed by the common hall may be entirely obstructed by its dissolution by the lord mayor. If, however, the lord mayor were to dissolve a common hall with a criminal intent and for criminal purposes, he might be liable to be punished for so doing. But that does not apply to the present question. On the charter day it is quite clear, that the election is the business with which the common hall ought to begin. Before, however, the Court will grant a criminal information against the defendants, they must be satisfied that they acted from criminal, and not merely from mistaken motives. Here however, the parties swear that they believed they had the right which they claimed. They have produced several instances in which business unconnected with the election, has had precedence on the charter day. They might be misled by these instances. I think therefore, that the rule ought to be discharged.

Holroyd J. In this case, the whole of the corporate body were assembled for a special and important purpose,

viz.,

viz., to choose the head of the corporation. Now, when they are so met, it seems but reasonable that that special purpose should have precedence unless by the general assent of the whole body it be otherwise arranged. I think that without the assent of the presiding officer, they had no right to go into other business previously to the election; and my opinion is confirmed by *Machell* v. *Nevinson* (a), where the Court held that the corporation must proceed in the business for which they were specially convened, in preference to any other, unless by the consent of the whole corporate body, or at least that of the presiding officer. Supposing, therefore, the business of the election not to have commenced previously to the interruption of it by the defendants, I think that interruption would not have been legal. But I am of opinion that the business of the election had commenced, for one part of the corporation had been separated from the rest, to perform the special function entrusted to them. And I think, therefore, that at that time they had no right to proceed on any other business, till that for which they had been so separated had been completed; that is the general rule of law, and I think that no particular custom in *London* to the contrary has been proved. The general rule of law seems to me to be recognised in the cases of *Oldknow* v. *Wainwright* (b), and *Rex* v. *Mayor of Carlisle* (c); in the latter case, which was a return to a *mandamus*, Lord C. J. *Pratt* stated this, "The powers of the common council, and the mayor and aldermen, are distinct. The common council can do no acts, unless assembled

(a) 2 *Ld. Raym.* 1355. *S. C.* 11 *East*, 84.
(b) 2 *Burr.* 1020. (c) 1 *Str.* 385.

1820.

The KING *against* PARKYNS.

in that capacity; neither can the mayor and aldermen, unless they met only as such, upon a regular summons for that purpose: as they had distinct authorities, they must be summoned in their distinct capacities. Here was no summons to meet as mayor and aldermen only, the consequence of which is, that the acts done by them in that distinct capacity are void." Now, here the livery were not assembled as a separate body, but they were separated from the rest of the corporation, in order to perform their part of the election, which was to be completed by the whole body; but a separation for that particular purpose does not give them a right to act as a separate body for any other purpose whatever, and unless there be, therefore, some special custom or charter which distinguishes this case from others, it seems to me that the reasoning of Lord C. J. *Pratt* applies to the present case, and that by law the livery could do no act when separated from the rest of the corporation. I think, therefore, that the right claimed by the present defendants does not exist. I entirely agree on the other point that this rule should be discharged.

BEST J. I entirely concur with the rest of the Court on both the points. It seems that an opinion has prevailed in the city of *London*, that there exists a right on the charter days for the election of lord mayor and sheriffs, to bring on for the consideration of the livery other matters unconnected with those elections, and that idea has been confirmed by an opinion of Mr. Serjt. *Glynn*, their recorder. Under these circumstances the rule ought not to be made absolute against the present defendants, who have acted under that misconception.

1820.

The KING *against* PARKYNS.

tion. But I am clearly of opinion that the right contended for does not exist; no authority has been cited in support of it, but it is insisted that when this corporation is assembled for these particular purposes, that they have a right by custom to proceed to the discussion of other matter. I think no such custom has been proved to exist, and I think if it had been proved, it would have been a bad custom by law. It is admitted in argument that they have no right to engage in a discussion of such length as would altogether put off the election; but that admission seems to me to make an end of the case, for if persons are allowed to interpose any other matters, who can say when the discussion will cease. It seems to me, therefore, that it is not lawful to give any other business precedence of the election. But here the election had actually begun, and the lord mayor and aldermen were necessarily absent in the discharge of their duty. I think, therefore, that there is no foundation for the right claimed by the present defendants.

Rule discharged. (*a*)

(*a*) In the course of these proceedings, *Chitty*, on the part of *Henry Hunt*, one of the Defendants, who had, in the interim, received sentence of imprisonment in *Ilchester* gaol for a misdemeanor, (vide *ante*, p. 444.,) applied for a writ of habeas corpus to bring him up, in order that he might shew cause in person against this rule; but the Court said that there was no precedent for such an application, and refused the writ.

1820.

Monday, June 12th.

TEMPEST *against* FITZGERALD.

A. agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the expiration of that time, *A.* rode the horse, and gave directions as to its treatment, &c., but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away: Held, that there was no acceptance of the horse within the meaning of the statute of frauds.

ASSUMPSIT for the price of a horse. Declaration contained counts for horses sold and delivered, bargained and sold, &c. Plea general issue. At the trial before *Park* J. at the last assizes for the county of *Lancaster*, the following facts were proved: In *August*, 1817, the defendant, then on a visit at the plaintiff's house, agreed to purchase a horse from him at the price of forty-five guineas, and to fetch it away about the 22d *Sept.* as he went to *Doncaster* races. The parties understood it to be a ready money bargain. The defendant said he wanted it for hunting, and the plaintiff proposed to put it in a course of physic during his absence. The defendant soon after quitted the plaintiff's house, and returned on the 20th *Sept.* He then ordered the horse to be taken out of the stable, he and his servant mounted, galloped, and leaped the horse, and after they had so done, his servant cleaned him, and the defendant himself gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which was consequently done; he then asked the plaintiff's son if he would keep it for another week; he said that he would do it to oblige him. The defendant then said, that he would call and pay for the horse when he returned from the *Doncaster* races, about the 26th or 27th *Sept.* He told plaintiff's groom that the horse ought to be galloped more, and that it was not then in a condition for hunting. The defendant returned on the 27th, with the intention to take it away, but the horse having died

on

1820.

TEMPEST *against* FITZGERALD.

on the 26th *Sept.* he refused to pay the price. Upon these facts it was contended by the defendant's counsel, that there had been no acceptance of the horse by him, so as to take the case out of the statute of frauds. The learned judge was of opinion, that if the acts done by the defendant on the 20th *Sept.* were to be considered as acts of ownership, that there was a sufficient acceptance; and he left it to the jury to say whether the riding of the horse on that day was by way of trial, or whether the defendant was then exercising an act of ownership; and whether the directions then given, were by way of advice or as owner. If they thought that he was then exercising acts of ownership, then they were to find for the plaintiff; if otherwise, for the defendant. The jury found a verdict for the plaintiff. A rule nisi having been obtained for a new trial in last *Easter* term,

Scarlett and *Holt* now shewed cause. The question was properly left to the jury, whether on the 20th *Sept.* the defendant had not exercised acts of ownership upon the horse. The jury have found that he had, and that being so, there was clearly an acceptance of the horse, within the meaning of the statute of frauds. In *Blenkinsop* v. *Clayton* (*a*), a case similarly circumstanced, the Court of Common Pleas thought it a question for the jury to determine whether the act done by the purchaser, was an act of ownership or not. *Chaplin* v. *Rogers* (*b*), is an authority to the same effect. The object of the legislature in the statute of frauds, was that there should be some act done by the party beyond the mere contract, to make it binding. Here such acts have been

(*a*) 7 *Taunt.* 597. 1 *B. Moore*, 328. (*b*) 1 *East*, 192.

1820.

Tempest *against* Fitzgerald.

done by the vendee, with respect to the property purchased, and admitting them to be equivocal in their nature, still the jury have found by their verdict that they were acts of ownership; and that being so, there can be no doubt that there was an acceptance of the property by the defendant, within the meaning of the statute of frauds.

Cross Serjeant, and *Milner*, contrà. The intent and meaning of the statute was, that there should be certain forms used in order to make a contract binding, or that there should be some clear unequivocal act done by the vendee, to shew that he had adopted the contract. In this case the acts relied upon were at least equivocal. This also was a ready money bargain, and the defendant could have no right to take away the horse until he paid the money. They were then stopped by the Court.

Abbott C. J. The statute of frauds was made for wise and beneficial purposes, and ought to receive such a construction as will best accord with the plain and obvious meaning of the legislature. By the 17th section it is enacted, " that no contract for the sale of goods, wares, or merchandizes, for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Now in this case there was not any earnest given, or any part payment, or any note or memorandum in writing. The question, therefore,

is

1820.

TEMPEST *against* FITZGERALD.

is whether the buyer had accepted part of the goods sold and actually received the same. Now the word *accepted* imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound. I do not mean, however, to say, that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him. In this case payment of the price was to be an act concurrent with the delivery of the horse; at any rate there is nothing to shew that either party understood that the one was to precede the other. In the first instance, therefore, this was a mere contract between the parties. It is urged, however, that there was evidence for the jury to find that the defendant had exercised acts of ownership as to the horse, on the 20th *Sept.* It appears from the learned judge's report, that on that day he came to the plaintiff's house; that he and his servant then rode the horse, and that he gave some directions as to its future treatment, and it is urged that these acts might be considered acts of ownership. I am of opinion, however, that the defendant had no right of property in the horse until the price was paid; he could not then exercise any right of ownership. If he had at that time rode away with the horse, the plaintiff might have maintained trover. The distinction between this case and that of *Blenkinsop* v. *Clayton* is, that there the contract was not for ready money, but the horse was to be delivered within an hour, and the defendant treated it as his own by offering it for sale; here the express contract is for ready money, and the payment of the price is an act concurrent with the delivery of the horse. I think, there-

1820.

Tempest against Fitzgerald.

therefore, that the rule for a new trial must be made absolute.

Bayley J. This was a ready money bargain, and the purchaser could have no right to take away the horse until he had paid the price. If the argument on the part of the plaintiff were to prevail, the defendant might have maintained an action for the horse without paying the price, which would be contrary to the express terms of the contract.

Holroyd J. The object of the statute of frauds was to remove all doubts as to the completion of the bargain, and it, therefore, requires some clear and unequivocal acts to be done in order to shew that the thing had ceased to be in fieri. Those acts are either that the buyer shall accept part of the goods sold, and receive the same, or give something in earnest or in part payment, or that the contract be reduced to writing. These are all acts that clearly and unequivocally shew that the bargain is executed. It is said that the riding of the horse by the defendant on the 20th *September*, and the directions then given, may be considered as acts of ownership, and were, therefore, evidence of an acceptance of the horse; but at that time the defendant had no right to take away the horse. For admitting, for the sake of the argument, that the property had been changed, still there is no evidence to shew that *Tempest* had ever parted with the possession or control, and if he had not, he had at all events a lien for the price, and the defendant could not be justified in taking it away until the price were paid. In *Blenkinsop* v. *Clayton*, the horse was to be delivered absolutely within an hour,

and

and the purchaser had treated it as his own property by offering to sell it to another; here, on the other hand, the horse was not to be delivered till the price was paid.

1820.

TEMPEST *against* FITZGERALD.

BEST J. I think that to take the case out of the statute of frauds, there should be some act so clear and unequivocal, as to shew beyond all doubt that the purchaser had accepted the horse. There is here no act of that description. This was a ready money bargain, and the defendant would, therefore, acquire no property in the horse until he paid the price. The acts, therefore, done by him on the 20th *September*, could not be acts of ownership, for at that time he had acquired no right to exercise any act of ownership.

Rule absolute. (*a*)

(*a*) See *Howe* v. *Palmer*, *ante*, 321.

KEYWORTH *against* HILL and Wife.

Wednesday, June 14th.

Declaration in trover against husband and wife stated that the defendants converted the property to their own use: Held, sufficient after verdict.

TROVER against husband and wife, for a bond and two promissory notes. The declaration stated that the defendants converted and disposed of the same to their own use, Plea, not guilty. After verdict for the plaintiff, a rule was obtained in last *Easter* term for arresting the judgment, on the ground that no action could be supported against the husband and wife for converting goods to their own use, inasmuch as the wife could acquire no property, and the conversion must be by the husband only, and *Berry* v. *Nevys* (*a*) was cited.

(*a*) *Cro. Jac.* 661.

G. *Mar*-

1820.

KEYWORTH *against* HILL.

G. Marriott now shewed cause. There are conflicting authorities upon this subject, but the later authorities are all in favour of the form of declaration adopted in the present case. In *Hodges* v. *Sampson* (*a*), this very point was decided in favour of the plaintiff by the Court of King's Bench, after conference with the other judges; and Sir *W. Jones* mentions, in a note, that when he was a Judge of the Common Pleas, the judgment in *Berry* v. *Nevys* was reversed in the Exchequer Chamber, and yet he concurred in the judgment in *Hodges* v. *Sampson*. *Draper* v. *Fulkes* (*b*), is an authority to the same effect, and this distinction is there taken in argument, that the action of trover is not grounded upon a property supposed to be in the defendants, but npon the conversion, which is a tort with which a feme covert might be charged as well as with a trespass. *Baldwin* v. *Marton* (*c*), and *Buller's N. P.* 46., are also authorities in point.

Tindal, contrà. In *Berry* v. *Nevys* (*d*), the Court of Exchequer Chamber upon error, held that the conversion must be laid to the use of the husband and not to the use of both husband and wife. In *Comyn's Digest*, tit. *Baron and Feme* Y, it is laid down that an action for a tort done by the husband and wife jointly shall be against the husband alone; for the whole shall be intended to be the act of the husband: as in the case of trover of goods and conversion to their use.

ABBOTT C. J. The question, in this case, arises upon a motion in arrest of judgment. The ground of the

(*a*) *Sir W. Jones*, 443.
(*b*) *Yelv.* 165. 7 *Jac.* 1. *B. R.*
(*c*) *Owen*, 48.
(*d*) *Cro. Jac.* 661.

objec-

1820.

KEYWORTH *against* HILL.

objection is, that inasmuch as a married woman cannot acquire property, the conversion of the property can only be the act of the husband, and must be so charged. If the allegation in the declaration, that the defendants converted the property to their own use, necessarily imported an acquisition of property by them, there would be considerable weight in the objection. It seems to me, however, that that is not the necessary import of the expression, for a conversion may be by an actual destruction of the property. And if the allegation does not necessarily import that the defendants acquired a property, we are bound, after the verdict, to consider the conversion to have taken place by other means than by the acquisition of property. I am, therefore, of opinion that the declaration is sufficient, and that this rule should be discharged.

BAYLEY J. It is quite clear that in trespass the husband and wife might be jointly sued. The reason of which is, that the action is founded on the wrongful act of the defendants. Now, it seems to me, that the action of trover is founded on the tort also. The cases cited on the part of the defendant proceed upon the supposition that the conversion could only take place by the defendants acquiring a property. It seems to me, however, that in trover the foundation of the action is not the acquisition of property by the defendants, but the deprivation of property to the plaintiffs. If the wife were to take up a book, and her husband desired her to put it in the fire and burn it, and she did burn it, that would be a conversion, and yet the husband and wife would acquire no property; so, if a man takes my horse and rides it, I may bring trover for the temporary conversion. And if there can be any case of a conversion

1820.

KEYWORTH *against* HILL.

sion without an ultimate change of property, we are bound, after verdict, to imply that it was such a conversion as the wife might be guilty of.

HOLROYD J. I am of the same opinion. The expression that the defendants converted the property, does not ex vi termini imply a transfer of the property to them. The old cases relied upon by the defendants seem to proceed upon the ground that the term "conversion" implies a change of property. It must be recollected, however, that trover will lie for a temporary conversion, and of that the wife as well as the husband may be guilty. Where, indeed, damages are given for the permanent value of the property, it has been held that the property becomes changed by virtue of the judgment; but if there can be any case in which the conversion could be by both, then, after verdict, we must intend that that was the conversion proved at the trial. I am therefore of opinion, that as the allegation that the defendants converted the property does not ex vi termini import that they acquired a property in it, we are to intend, after verdict, that the conversion proved was one of which the wife might be guilty as well as the husband, and therefore that the objection ought not to prevail.

BEST J. I am of the same opinion. The argument urged on the part of the defendant assumes that the action of trover will lie only in case of a permanent conversion of the property: but that is not so; for it will lie against a person who takes the goods of another and immediately hands them over to a third person. To support the action, it is sufficient to shew deprivation on the

part

part of the plaintiffs, without shewing that the defendants actually converted the property to their own benefit. Inasmuch, therefore, as there may be a conversion without acquisition of property, I am of opinion that after verdict this declaration is sufficient. There may be a distinction between detinue and trover: in the former, the plaintiff seeks to recover the goods in specie; in the latter, he only asks for damages.

Rule discharged.

(*a*) See *Marshe*'s case, 1 *Leonard*, 312. And *Isaac* v. *Clarke*, 2 *Bulstrode*, 308., per *Doddridge* J., "If goods are delivered to husband and wife, no action of detinue lies against them both for these, but against the husband alone." And he cites 38. Ed. 3. fol. 1. And the reason of this is that the wife cannot detain.

GOODTITLE, on the Demise of KING, *against* WOODWARD.

Wednesday, June 14th.

To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent it is sufficient, if his authority be subsequently recognised; and therefore, where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others: Held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient.

EJECTMENT on the demise of several trustees, seised of property in trust for the repair of a highway, as joint tenants. Plea, not guilty. The cause was tried before *Best* J., at the last assizes for the county of *Leicester*, and the only point in the cause was as to the sufficiency of the notice to quit. The defendant being tenant from year to year; the notice was signed by one *Charles King*, and purported to be given by him as agent for all the trustees. When it was served, the tenant made no objection to it. In order to shew the

1820.

GOODTITLE *against* WOODWARD.

authority of the agent who signed the notice (he having died before the trial) a written authority was produced, signed by all the trustees; but it appeared that at the time the notice was served, the authority to the agent had only been signed by part of the trustees, and that the rest had signed it subsequently. It was objected that the authority was not sufficient, because, at the time of giving the notice to quit, it was not signed by all the trustees. The learned Judge inclined to think that the subsequent recognition of the authority of the agent was sufficient. It was stated, however, that in a late case the Court of Common Pleas had ruled otherwise, and in deference to that authority he directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. A rule nisi having been obtained for that purpose in last *Easter* term

Clarke and *Adams* now shewed cause. At the time when this notice was delivered to the tenant, the agent who signed it had authority only from some of the plaintiffs. It is true that the rest subsequently signed it; but *Right* and *Cuthell* (a) is an authority to shew that a notice signed by two out of three joint-tenants is not sufficient, and that a subsequent recognition by the others will not do.

Phillipps and *G. Marriott*, contrà. There is a distinction between a notice to quit and an authority to an agent to give such notice. If the trustees had not employed an agent, but had given the notice themselves, all must have signed it; and if any one had omitted to

(a) 5 *East*, 491.

sign

1820.

GOODTITLE *against* WOODWARD.

sign it would have been insufficient, for the reason given in *Right* and *Cuthell*, viz. that the tenant is entitled to such a notice as he could act upon with certainty at the time it is given. But here a person was deputed to give a notice in the name of the trustees, and a subsequent recognition of his authority, by all the trustees signing it before the ejectment, gives validity to the authority from the beginning. The reasoning in the case of *Right* and *Cuthell* does not apply; for the written authority need not be shewn to the tenant when the notice is delivered; for he can derive no information from the notice, whether the authority has been signed by all or by what number of the lessors of the plaintiff. There is no reason, therefore, why the recognition by the lessors of the plaintiff before the ejectment should not have the effect of giving validity to the authority. The maxim of law applies to this case, "Omnis ratihabitio retrohabitur et mandato æquiparatur." And on this principle an entry on land, made by a person without authority, on behalf of an heir at law, to take advantage of a condition, is a sufficient entry, if assented to afterwards by the heir. *Co. Litt.* 258. *a.*, *Fitchet* v. *Adams* (*a*), and *Trevillian* v. *Pine* (*b*), are authorities in point.

ABBOTT C. J. I am of opinion that the occupier, having received notice to quit, purporting to be given on the part of all the lessors of the plaintiff, had then such a notice as he could act upon with certainty at the time it was given; the inconvenience, therefore, contemplated in *Right* and *Cuthell* does not arise in this case.

(*a*) 2 *Stra.* 1128. (*b*) 11 *Mod.* 112. *S. C. Salk.* 107.

1820.

GOODTITLE *against* WOODWARD.

The only question is, whether the agent had authority to give the notice: and I am of opinion that the maxim of law "Omnis ratihabitio retrohabitur et mandato æquiparatur" applies here, and that the subsequent recognition by all the lessors of the plaintiff gives effect to the authority.

Rule absolute.

Friday, June 16th.

FARRANT and Another *against* OLMIUS.

In covenant by lessor against lessee upon a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages for the actual injury sustained instead of the increased rent, the Court will not refuse the plaintiff a new trial, on the ground that the verdict was consistent with justice; secondly, the Judge having expressly directed the jury to find damages to the amount of the increased rent; the Court granted the new trial without payment of costs.

COVENANT by lessor against lessee. The lease set out in the declaration contained, besides a common reservation of a certain fixed annual rent, the following reddendum: "yielding and paying the further yearly rent of 50*l.* for every acre of certain fields therein described as, at the time of the lease, being ploughed up, which should not for three years before the expiration or other determination of the demise be laid down for grass, and so kept down during the remainder of the term; and also, for every acre of the lands and hereditaments thereby demised, except the said fields mentioned in the former reservation, which the defendant should plough, dig up, or convert into tillage, the yearly rent of 50*l.* per annum for every acre." There were also covenants for repairing, and for delivering up the premises in repair. The breaches assigned were, first, for delivering up the premises out of repair; secondly, that the defendant did not, three years before the expiration of the term, lay down the fields mentioned in the first reddendum for grass, nor continue the same so laid down for the remainder of the demise, whereby the defendant became

liable

1820.

FARRANT *against* OLMIUS.

liable to pay at the rate of 50*l.* per annum for every acre of the same; thirdly, that the defendant, in the years 1816, 1817, 1818, and 1819, converted into tillage fifty acres of the lands, being other and different from the fields mentioned in the former covenant, and kept and continued the same so converted into tillage until the termination of the term, whereby the defendant became liable to pay 50*l.* per annum for every acre of the said last-mentioned lands. The defendant pleaded several pleas, taking issues upon the several breaches. At the trial before *Richards* C. B., at the last assizes for the county of *Kent*, the plaintiff proved that the premises were delivered up at the end of the term out of repair; and he also proved that the defendant had not, within three years before the termination of the term laid down for grass, any of the lands mentioned in the first reddendum. His counsel, however, stated, that in that respect he would only take a verdict for one half a-year's increased rent. It was then proved that the defendant had converted into tillage, during the last four years of the term, such a quantity of the lands mentioned in the other reddendum as, at the rate of 50*l.* per acre per annum, would entitle him to the increased rent of 1550*l.*; but it appeared that the actual damage to the land did not amount to that sum. The learned Judge directed the jury to find such damages for the breach of the covenant to repair, as in their judgment would be a compensation to him for the actual damage he had thereby sustained; and as to the other breaches, he directed the jury that the plaintiff was entitled to recover damages at the rate per annum mentioned in the reddendum, and therefore he directed the jury to find half a year's rent for the land not laid into grass, and 1550*l.* for

1820.

FARRANT *against* OLMIUS.

the land converted into tillage. The jury brought in a verdict for 1100*l.* damages; and being desired by the learned Judge to reconsider the same, and to specify how much they allowed for the repairs, and how much for the land, they stated that they found 500*l.* damages for the repairs, and 600*l.* in respect of the injury done to the land. In *Easter* term *Marryat* obtained a rule nisi for a new trial, on the ground that the jury were bound to give the increased rent. And now

Chitty and *Thesiger* shewed cause. The Court will not set aside this verdict if they can see that justice has been done. The plaintiff seeks to recover, not only a compensation for the actual injury he has sustained, but a gross sum reserved as stipulated damages, in the event of certain things being done. The jury have given him a compensation for the actual damage he has sustained, and their verdict is therefore consistent with the justice of the case. In *Smith* v. *Frampton* (*a*) the Court refused to grant a new trial where there had been a verdict for the defendant in an action for negligently keeping his fire, by which plaintiff's house was burnt, on the ground that it was a hard action. In *Farewell* v. *Chaffey* (*b*) Lord *Mansfield* said that a new trial ought to be granted to attain justice, but not to gratify litigious passions upon every point of summum jus: here the plaintiff insists upon summum jus. And he also cited *Deerly* v. *The Duchess of Mazarin* (*c*), and *Cox* v. *Kitchen* (*d*), as authorities to shew that the Court will not set aside a verdict against law, if consistent with the justice and conscience of the case.

(*a*) 1 *Ld. Raym.* 62.
(*b*) 1 *Burr.* 54.
(*c*) 2 *Salk.* 646.
(*d*) *Bos. & Pull.* 338.

Marryat

1820.

FARRANT *against* OLMIUS.

Marryat and *Barnewall*, contrà, were stopped by the Court.

ABBOTT C. J. The jury, in this case, have given by their verdict a compensation for what they consider to be the actual damage sustained, when, in point of law, they ought to have given the increased rent. It is said, however, that the Court ought not to disturb such a verdict, because it is consistent with justice. If that argument, however, were to prevail, it would encourage juries to commit a breach of duty by finding verdicts contrary to law, and would enable them to set aside the contracts of mankind. There certainly is nothing unreasonable in a landlord stipulating that particular lands shall not be converted into tillage at all, and that in case that be done, a large sum shall be paid by way of stipulated damages. In this case, there is an express contract for stipulated damages, and the jury have given a verdict for arbitrary damages. I am therefore of opinion that there should be a new trial.

Chitty then urged, that inasmuch as this was a mistake of the jury, the rule could only be made absolute on payment of costs; but the Court said, that inasmuch as the jury had found their verdict contrary to the express directions of the learned Judge, in point of law, the rule should be made absolute generally.

Rule absolute. (*a*)

(*a*) At the Summer assizes the defendant tendered evidence to shew that the actual damage to the land was less than the sum claimed as increased rent; but *Abbott* C. J. rejected the evidence, and the plaintiff recovered the increased rent.

1820.

Tuesday, June 20th.

JEFFERIES *against* SHEPPARD, Esq.

In an action brought against the sheriff for money levied under a fi. fa. without any previous demand, the Court will stay the proceeding, upon payment of the sum levied, without costs.

THIS was a rule calling on the plaintiff to shew cause why, on payment of 36*l.* without costs, proceedings should not be stayed. The defendant was late sheriff of the county of *Gloucester*, and in *Michaelmas* term last a writ of fi. fa. was directed to him in an action at the suit of the present plaintiff, indorsed to pay 36*l.* In *Hilary* term the sheriff was ruled to return the writ, and returned fieri feci. Upon which the plaintiff brought an action for money had and received, to recover the amount of the levy. The rule was obtained on an affidavit from the under-sheriff, stating that he had always been ready to pay the money to the plaintiff, and that the present action had been commenced without any demand of the money having been previously made.

Marryat, for the plaintiff, contended that the Court ought not to interfere.

ABBOTT C. J. For the protection of sheriffs who act with good faith, I think we ought to interfere, and to stay proceedings where an action like this is commenced without a previous demand of the sum levied; and we think the sheriff has come in time to make this application.

Per Curiam. Rule absolute.

Campbell for the defendant.

1820.

CHALMERS, Assignee of LLOYD, a Bankrupt, *against* PAGE.

Wednesday, June 21st.

Certain policies of insurance belonging to *A.* had been deposited by him as a security for a debt of 800*l.* at a banker's, *B.*, who was acquainted with these circumstances, afterwards, at the desire of *A.*, expressly undertook to take the policies and to settle with *H. W.*, and to pay in the amount which he might receive at the banker's to *A.*'s account there. Upon this undertaking the policies were given to him, and upon them he received the sum of 949*l.* *A.* having become bankrupt, and being then indebted to *B.* in a larger sum, the latter refused to pay over the money so received: Held, that the assignee of *A.* could not (even with the assent of the banker) maintain any action against *B.* for the breach of his undertaking.

ASSUMPSIT upon a special contract between *Lloyd* and the defendant. Plea, general issue. At the trial of the cause, at the *Guildhall* sittings after last *Michaelmas* term, before *Abbott* C. J., a verdict was found for the plaintiff for 946*l.* 6*s.*, subject to the opinion of this Court, upon the following case. In the year 1811, certain policies of insurance, upon which a loss had happened, were put into the hands of the defendant, by *James Lloyd*, the bankrupt (being the person interested) in order that the defendant might procure the underwriters to adjust the loss, and might collect the money from them; and upon this occasion, one *John Air*, an underwriter for 200*l.*, adjusted the loss, and cancelled his name on the policy, but did not pay the amount of his subscription to the defendant, nor did the defendant render an account thereof to *James Lloyd*. After this adjustment and cancellation, the policies were delivered, by the defendant, to *Lloyd*, and he, before the month of *October*, 1812, and before his bankruptcy, deposited the same with Messrs *Prescott*, *Grote*, and Co., his bankers, as security for monies advanced or to be advanced. On the 9th *October*, 1812, *Prescott* and Co. had a lien on the policies, to the amount of 843*l.* 16*s.* 5*d.*, which debt was never lessened before *Lloyd*'s bankruptcy. On the said 9th *October*, the defendant, who then was acquainted with the lien which Messrs. *Prescott* and Co. had upon the policies, wrote the following letter to the bankrupt, dated 9th *October*, 1812. "In compliance with

1820.

CHALMERS *against* PAGE.

with your wishes, I will take the policies on the *Hope* for 3550*l.*, and endeavour to settle with the underwriters for their subscriptions. The amount I may recover on the aforesaid policies, I will engage to pay over to Messrs *Prescott*, *Grote*, and Co., for your account." In pursuance of this letter, the policies were placed in the hands of the defendant, and he afterwards, and before the commencement of the action, received from several of the underwriters divers sums, amounting to 949*l.* 6*s.*, and also received from *Air* 200*l.*, at which *Air* had adjusted the loss upon the cancellation of his name. At the time when the defendant received the policies in pursuance of his letter, he had a claim upon *Lloyd* to an amount less than the whole sum subsequently received by him upon the policies; but *Lloyd* afterwards became further indebted to him, so as to render his claim greater than the amount of those sums. On the 6th *February*, 1816, a commission issued against *Lloyd*, under which the plaintiff was chosen assignee. The defendant claimed to be allowed the debt due to him from the bankrupt, against the sums received by him on the policies. The present action was brought by consent of *Prescott* and Co., and the question for the opinion of the Court was, whether the plaintiff had a right to maintain the present action for a breach of the agreement contained in the said letter of *October* 9th, 1812, and whether the counter claim of the defendant was an answer to such action, or any part of the demand ought to be recovered. The case was argued in last *Hilary* term by

F. Pollock for the plaintiff. The question is, whether the plaintiff, as assignee of *Lloyd*, can maintain this action

1820.

CHALMERS against PAGE.

action, and whether, if he can, the defendant is not entitled to the set-off claimed by him. Whenever a trader has an interest in a contract, that interest passes to his assignee, in case he becomes a bankrupt, and the assignee must sue upon that contract. This doctrine may be found in *Winch* v. *Keeley* (a), and *Carpenter* v. *Marnell* (b), where the rule laid down is, that property in which a bankrupt has only a trust estate, does not pass to his assignees; but wherever there is an interest, it does. Now here, admitting that, as far as *Prescott* and Co's. debt is concerned, the bankrupt is to be considered as a trustee for them; it is clear, that as to the surplus, he is himself interested. The whole, therefore, passes to his assignee, who must bring the action, and having recovered the property, the assignee will be in the situation of a trustee for *Prescott* and Co., as far as their debt extends, and will hold the remainder for the general benefit of the whole body of creditors. Then, secondly, the defendant is not entitled to a set-off; for he has, by his own special agreement, deprived himself of it. In his letter, he expressly undertook to pay over the amount he might receive to *Prescott* and Co. for the account of *Lloyd*. He knew of the lien which *Prescott* and Co. had upon the policies, and with that knowledge made this promise. In *Fair* v. *M'Iver* (c), the set-off was refused, because, in that case the defendant was not the bonâ fide holder of the bills sought to be set off. Here there was no mutual credit; for there was no deposit of property, nor any interchange of liability. The policies were put into the defandant's hands upon a special agreement, which he has violated. He cannot,

(a) 1 *T. R.* 619. (b) 3 *B. & P.* 40. (c) 16 *East*, 130.

there-

1820.

CHALMERS against PAGE.

therefore, be entitled to a set-off, and ought not to be in a better situation than he would have been in case *Lloyd* had not been a bankrupt.

Wylde, contrà. It is admitted, that where the bankrupt is a mere trustee, no interest passes to his assignees. Here, then, the plaintiff is in this situation; if *Prescott* and Co. have a right to part of this money, the assignees, as to that, have no right to sue. If the other part is the property of the bankrupt, as to that, the defendant has a right of set-off; for that right of set-off is expressly given by the *5 G. 2*. The assignees have no right to recover that which will not be divisible ultimately amongst the general body of creditors. The only promise by the defendant in this case is, that he will pay over to the bankrupt's account what he may collect under the policies. Even if no bankruptcy had not intervened, the defendant would have had a right of set-off. In *Atkinson* v. *Elliott* (a), the bankrupt being indebted in two sums, for goods sold, in the first of which the credit had expired, and in the second not, gave a bill of exchange exceeding the whole amount of the first goods, and the defendants expressly agreed to repay him the overplus; yet in that case they were allowed a set-off, in respect of the second parcel of goods. That case was one of an express contract, and is very similar to the present. The cases of *Lechmere* v. *Hawkins* (b), *Cornforth* v. *Rivett* (c), *Smith* v. *Hodson* (d), and *Eland* v. *Karr* (e), are to the same effect. In the last case, there was the additional circumstance, that the goods

(a) 7 *T. R.* 378.
(b) 2 *Esp.* 625.
(c) 2 *M. & S.* 510.
(d) 4 *T. R.* 135.
(e) 1 *East*, 375.

had

had been fraudulently obtained. The case of *Fair* v. *M'Iver* turned on the ground of fraud only.

F. Pollock, in reply. The contract was entire, and cannot be severed; and if the bankrupt be interested in any part, the assignee may maintain this action. The cases cited are distinguishable, on the ground, that here the contract between the parties expressly excludes the defendant from his set off.

Cur adv. vult.

The judgment of the Court was now delivered by *Abbott* C. J., who, after stating the case, proceeded thus. Upon the argument in this case, it was contended, on the part of the defendant, that, considering this letter of the defendant to be an agreement entered into by him, for the benefit of *Prescott* and Co., the interest in the contract and the right to sue, would not pass under the commission to the assignee of the bankrupt; and if so, the plaintiff could not maintain the present action; or if it is to be considered as an agreement for the benefit of the bankrupt, then, in that view, although the assignee might sue, yet if he did, the defendant, under the statute of *5 G. 2. c. 28.*, would be entitled to set off his demand on the bankrupt. The defendant is, therefore, put in this dilemma, by the argument: either he is not competent, by law, to maintain this action, or, if he is competent, the defendant has a good answer to it. It is not necessary for us to say, whether *Prescott* and Co. could maintain an action against the defendant, because they are not before us; and, although the case has stated, that the action by the assignee was brought with their consent; yet still

no

1820.

CHALMERS *against* PAGE.

no judgment which we could give on this record, would be at all binding on them. We are of opinion, that the plaintiff is placed in the dilemma which I have before mentioned, and, consequently, that in either view of the case, there must be judgment of nonsuit.

Nonsuit entered.

Wednesday, June 21st.

LEWIS, Gent. *against* CLEMENT.

Declaration for a libel concerning the plaintiff in his profession as an attorney. The libel began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in the court of law: Held, after verdict for the defendant, that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.

Quære, Whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the enquiry.

DECLARATION by plaintiff, an attorney, stated that before the publishing of the libel he had been retained and employed by one *Wm. Carter* as his attorney, and that the defendant, intending to injure him, did compose, print, and publish, in a public newspaper called *The Observer*, the following libel concerning the plaintiff in his profession, and concerning his conduct in the proceedings on behalf of *Wm. Carter*: "Insolvent Debtors Court — *Shameful conduct of an attorney. Eades* and *Wood* v. *Carter* — *Wm. Carter*, "the insolvent, an elderly man, by trade a carpenter, "who resided at *Ramsgate*, and possessed a house and "garden, exceeding 500*l.* in value, was opposed in "his discharge by Mr. *Heath* on the part of his creditors. The ground of Mr. *Heath*'s opposition was "that the insolvent had put his clients, the opposing "creditors, to considerable expense in defending two "actions,

1820.

LEWIS *against* CLEMENT.

"actions, brought by them for goods delivered and "received, and for bringing a bill of error after the "verdict had been given against him, which put them "to a further expense; and also for wasting his effects, "by giving a warrant of attorney, and mortgage of "his house, to his solicitor, Mr. *Lewis*, of *Ramsgate*, "and thereby defrauding the remainder of the cre- "ditors by such an undue preference." The libel then proceeded to give the substance of the speeches of counsel and the examination of the insolvent, which contained matter reflecting on the plaintiff's conduct as attorney, and concluded by stating, that the Judge, Mr. Serjeant *Runnington*, deprecated in strong language the conduct of plaintiff, and suggested to Mr. *Heath* that in such a flagrant case they ought to apply to the Court of King's Bench — upon the subject of *Lewis*'s conduct. Plea, first, not guilty; second, that *William Carter* had been imprisoned and detained in custody for debts due to *Eades* and *Wood*; that *William Carter* appeared before the insolvent debtor's court as an insolvent debtor seeking his discharge from imprisonment; and that upon that occasion *G. H.* Esq., as counsel for *Eades* and *Wood*, publicly in the court opposed the discharge of *Carter* from imprisonment; then stating, as such counsel, publicly in and to the same Court, as follows: "It then set out his statement, as well as that of the opposite counsel, the insolvent's examination, and the observations of the Judge in the words of the libel, and concluded by stating that the insolvent debtors' court was and still is a public court of justice of our lord the king, and that the libel in the declaration mentioned was and contained a faithful and true account of the several proceedings so had in the

1820.

LEWIS *against* CLEMENT.

the same as aforesaid on the occasion aforesaid. Replication, that the defendant published the same of his own wrong. The cause was tried before *Abbott* C. J. at the Summer assizes, 1818, for the county of *Kent*, when the jury found a verdict for the defendant on the justification. *Marryat*, in *Michaelmas* term, following obtained a rule nisi for entering judgment for the plaintiff, on the ground that the pleas were insufficient. First, because it is not lawful to publish what passes in a court of justice, if it be defamatory of another who is neither a party to the suit nor present at the enquiry; secondly, because the pleas do not purport to set out the very words used, but only the effect of them; and, thirdly, because they only go to that part of the libel which purports to contain the statement of what actually passed in the court, and do not justify the comment with which it was accompanied, viz. shameful conduct of an attorney.

Adolphus and *Platt* now shewed cause. The objections to the pleas are: first, that in point of law this publication of the proceedings of a court of justice containing matter defamatory is not justifiable; and, secondly, that at all events the particular justification on this record is insufficient. The object of the law in repressing slander is twofold, first to preserve to individuals their good fame, and secondly, to prevent those breaches of the peace which the publication of slanderous matter has a natural tendency to produce. It is not merely because a publication gives pain and produces a serious injury to another, that it is therefore actionable or indictable; for a severe or ludicrous criticism on the works

works of an author is not actionable, *Carr* and *Hood.* (*a*) In *Lamb's* case, it is laid down, "that every one who shall be convicted shall be a contriver of the libel or procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel; for if one reads a libel, that is no publication of it, or if he hears it read, it is no publication of it; for before he reads or hears it he cannot know it to be a libel: or if he hears or reads it and laughs at it, it is no publication of it: but if, after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it, or if he writes a copy of it and does not publish it to others, it is no publication of the libel: for every one who shall be convicted, ought to be a contriver, procurer, or publisher of it, knowing it to be a libel." In this case of the supposed libel, the defendant, when he first heard the subject matter in the insolvent debtors' court, did not know that it was a libel, and he was neither an inventor or a contriver, and therefore the publication is not actionable. There are authorities to shew that it is lawful to publish proceedings in courts of justice in a candid, fair, and impartial manner, nay, not only that they may be published, but that they may be animadverted upon. *Rex* v. *Hart and White* (*b*) and *Curry* v. *Walter* (*c*) are authorities in point. In the latter case, Lord C. J. *Eyre* held, that a bona fide report of what passed in a court of justice was not actionable, and he is reported to have told the jury that although what was contained in the paper, might be very injurious to the

(*a*) 1 *Campb.* 355. (*b*) 1 *Campb.* 359.
(*c*) 1 *Esp.* 457.

cha-

1820.

LEWIS *against* CLEMENT.

character of magistrates, he was of opinion, that, being a true account of what took place in a court of justice, which is open to all the world, the publication was not unlawful; and the Court of Common Pleas confirmed that opinion. *Rex* v. *Fisher* (*a*) is an authority to the same effect. The reason for allowing such publications is thus given by *Lawrence* J., in *Rex* v. *Wright* (*b*): "The general advantage to the country, in having these proceedings made public, more than counterbalances the inconveniences to private persons, whose conduct may the subject of such proceedings. The same reasons, also, apply to the proceedings in parliament. It is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be circulated; and they would be deprived of that advantage, if no person could publish them without being published as a libeller." In *Rex* v. *Creevey* (*c*) it was held, that a member of parliament may be indicted for publishing a report of his speech delivered in that house, if it contained libellous matter, although the publication were a correct report of such speech, and be made in consequence of an incorrect copy having appeared in the newspapers. So also, if a party publish a highly coloured account of judicial proceedings, with observations upon what passed in court. *Stiles* v. *Nokes*. (*d*) These are exceptions to the general rule, and do not establish, that, because every thing may not be published, nothing shall be published at all. In all such cases, it must be a question for the jury, with what mind the party published the statement complained of, whether he did it with a view of fairly

(*a*) 2 *Campb.* 563.
(*b*) 8 *T. R.* 298.
(*c*) 1 *M. & S.* 273.
(*d*) 7 *East*, 493.

com-

1820.

LEWIS *against* CLEMENTS.

communicating to the public a true account of the proceedings or not. The circumstance of the plaintiff's not being a party to nor present at the discussion which took place in the insolvent debtor's court, and, therefore, having no means of proving the contrary of what was asserted to his prejudice, cannot vary this case. For if the plaintiff's conduct gave rise to the discussion, he could have no reason to complain of what took place. The same objection would apply, in all cases where the conduct of a third party gives rise to the cause. In cases of usury and gaming, the discussion usually arises from the conduct of a person not a party to the cause. If the plaintiff's conduct was necessarily incidental to the discussion then before the Court, it was impossible to avoid enquiring into it, and it was equally impossible to give a true account of what took place, without stating that which related to him. The second objection is, that the pleas apply only to the effect of what had passed in the insolvent debtors' court, without stating the words used. But if it be lawful to publish the proceedings of a court of justice, it must be so to publish the substance and effect of those proceedings; for it is impossible to give the very words used, and the defendant has justified in the words of the libel. Thirdly, the comment which is contained in the title, "Shameful conduct of an Attorney," is warranted by the facts disclosed by the report. And, if the facts which justified that comment, were a legal publication, it follows, that the comment itself is equally so.

Marryat and *Chitty*, contrà. This statement, which consists of the supposed observations of the Judge of the Court, of the counsel on both sides, and of the evidence

1820.

LEWIS *against* CLEMENTS.

dence of the insolvent, is not a privileged publication, because it contains matter defamatory of a third person, not a party to the suit, nor present on the enquiry, and, consequently, not then in a condition to enter into his own justification. A party is not entitled to publish any matter, merely because it passes in a court of justice, without enquiring into its truth or falsehood. The right claimed, appears to have taken its rise, from the privilege that is allowed in courts of justice. In the course of legal proceedings, the affidavit of a party, even though it contain matter reflecting upon the character of another person, is privileged, if material to the question before the Court. The same privilege is allowed to a person presenting a petition to the House of Commons: so also to members of both Houses of the Legislature, speaking in parliament, or to a witness upon examination, although his evidence may be calculated to injure the character of a third person. In all these cases, however, the privilege is allowed from the necessity of allowing a free discussion and examination of matters either in parliament or in courts of justice. The privilege, however, goes no further; for it is not competent to a man to print and publish elsewhere matter thus privileged in the place where it is delivered. Thus, also, counsel are privileged, from the necessity of permitting a free discussion for the interest of their clients; if they were, however, to repeat out of court defamatory language which they spoke while in the discharge of their professional duty they would be liable to an action. It has been expressly decided that a member of parliament is not justified in printing and publishing a speech which he had delivered in parliament, even though the object of the publication was to correct a mis-statement which

had

1820.

LEWIS *against* CLEMENTS.

had been made of that speech; *Rex* v. *Creevey.* (*a*) It has also been held, that if a man distribute printed copies of a petition beyond those printed for the House of Commons, he is liable to an action, if the petition contained libellous matter; *Lake* v. *King.* (*b*) In this case, there clearly was no necessity for publishing this statement; and, therefore, it is not privileged. The first attempt to publish a libellous statement of what passed in a court of justice occurred in 1796, in the case of *Currie* v. *Walter.* But in that case no judgment was ever pronounced. The case of *Rex* v. *Wright* only shews that the Court will not grant a criminal information for publishing a report of a committee of the House of Commons reflecting on the character of an individual. Admitting, however, the necessity for the publication of proceedings of courts of justice, there could be no necessity to give the names of the parties, or to give a slanderous title to the publication. These pleas are also bad, because they do not affect to give the precise language used on the occasion to which it relates, for they only state — "the counsel suggested — the witness persisted — and, the Judge deprecated." — It is incumbent on a person who justifies the repetition of slander to give the precise words in which the slander was uttered, in order to furnish the person slandered with the means of bringing an action against the person whose slander he repeated. The pleas are also defective, because they do not justify the whole of the publication: for there is no justification of the words — "Shameful conduct of an attorney."

(*a*) 1 *M.* & *S.* 273. *vide Rex* v. *Lord Abingdon*, 1 *Esp. N. P. C.* 226.
(*b*) 1 *Levinz*, 240.

1820.

LEWIS *against* CLEMENTS.

ABBOTT C. J. now delivered the judgment of the Court. This was an action for a libel, which professed to contain a narrative of the proceedings of the court of insolvent debtors, on the application of a person of the name of *Carter*, to be discharged from imprisonment. It begins, "Shameful conduct of an Attorney," and then proceeds with a detail of the speeches of counsel, the examination of the insolvent, and the observations of the Judge. The defendant pleaded that the supposed libel contained a correct account of what actually passed in the court on the occasion alluded to. Issue was joined, and a verdict was found for the defendant. An application was made to the Court, by the plaintiff, that he might have judgment, notwithstanding the verdict, on the ground that the pleas were bad in point of law. The matter was argued before us at *Serjeants'* Inn, and we are all of opinion, that the pleas are insufficient. The question, whether a person may publish a correct narrative of proceedings in a court of justice, which contains matter defamatory of a third person, not a party to the suit, it is not necessary to decide, because, in this case, the narrator has not confined himself to what actually passed in court, but has prefaced the statement with the words "Shameful conduct of an Attorney." He has, therefore, taken upon himself to make that allegation concerning the plaintiff. We think, therefore, that the pleas are bad, and that there must be judgment for the plaintiff, notwithstanding the verdict.

Judgment for the plaintiff.

GRUMBRELL *against* ROPER.

A lease by the warden and poor of an hospital, under the corporation seal, made before the expiration of a former lease, to a lessee, who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital.

THE Vice-Chancellor sent the following case for the opinion of the Court:

By indenture of lease dated 27th *October*, 1796, made between the warden and poor of the hospital of the *Holy Trinity* in *Croydon*, in the county of *Surrey*, of the foundation of the most reverend Father in God *John Whitgift*, some time Lord Archbishop of *Canterbury*, of the one part, and *Samuel Shore* and *Joseph Price*, surviving executors of *Richard Sherbrooke*, deceased, of the other part, in consideration of the surrender to be cancelled of a former lease of the premises after-mentioned, theretofore granted to *Shore* and *Price* by the warden and poor, for a term of years not then fully expired, (being a term which, if not surrendered, would have expired on 29th *September*, 1803); as also, in consideration of a competent fine to them paid by *Shore* and *Price*, the warden and poor demised, granted, and to farm let, to *Shore* and *Price*, certain land and premises in the indenture described, to hold to them, their executors and administrators, from *Michaelmas* then last for twenty-one years, at the yearly rent of 15*l.* At the time when the lease of 27th *October*, 1796, was granted, the term in the prior and then subsisting lease was vested in *Shore*, *Price*, and *William Hood*, as *assignees of the term* granted by such lease; and such assignment was made to them upon the trusts of the will of *R. Sherbrooke*, in consequence of the death of another executor, and *Hood* did not join in the surrender of the pre-existing lease. By indenture 15th *May*, 1798, between *Shore*, *Price*, and

1820.

GRUMBRELL *against* ROPER.

Hood, of the one part, and *Mary Wilkes* of the other part, *Shore*, *Price*, and *Hood* assigned to *Mary Wilkes* (inter alia) all the same closes or parcels of land, to hold to her for the residue of the term, subject to the rents and covenants contained in the lease. By indenture dated 21st *June*, 1800, between *Mary Wilkes* of the first part, *Thomas Irvine* of the second part, and *John Wainewright* of the third part, *Mary Wilkes*, for the considerations therein mentioned, (by virtue of a licence from the warden and poor of the hospital, and by the appointment of *Irvine*,) assigned the said lands and premises to *Wainewright*, for the residue of the said term, and of all the terms to be obtained thereof upon trust: as to four undivided six parts thereof, in trust for *Irvine*; as to one other undivided sixth part thereof, in trust for one *Miriam Garrard*, widow, her executors, &c.; and as to the remaining one undivided sixth part thereof, in trust for the executors or administrators of *Joseph Kaye*. On 31st *January*, 1801, *Kaye*'s interest was duly assigned to *Irvine*; and in *February*, 1805, Mrs. *Garrard*'s interest was also assigned to him, and *Wainewright* then conveyed the legal estate to him. By indenture 23d *February*, 1804, made between the warden and poor, by their corporate description, of the one part, and *Irvine* of the other part, in consideration of the surrender of a former lease of the said lands and hereditaments theretofore granted by the warden and poor to *Shore* and *Price*, as surviving executors of *Richard Sherbrooke*, and by them assigned to *Irvine* for a term of years not then expired, to be cancelled; as also, in consideration of a competent fine paid by *Irvine*, the warden and poor leased to *Irvine*, his executors, &c. all the said lands and premises, which are described to be, and actually

were,

1820.

GRUMBRELL against ROPER.

were, at that time in the occupation and possession of *Irvine*, or his undertenants, to hold to *Irvine* from *Michaelmas* then last for twenty-one years, at the yearly rent of 15*l*. The hospital of the *Holy Trinity* in *Croydon* is a corporation, and was founded by Archbishop *Whitgift*, by the name and description specified in the first-mentioned indenture of lease, in virtue of letters patent from Queen *Elizabeth*, dated 2d *November*, in the 38th year of her reign, empowering him so to do; or under and in virtue of the stat. 39 *Eliz. c.* 5., which passed before the actual creation or foundation of the hospital. The two leases are under the hospital's common seal, and 15*l*. per annum is the accustomed rent reserved for the said premises ever since the same belonged to the corporation, and has been regularly paid by the successive lessees thereof to the present time. The question for the opinion of the Court was, whether the lease to *Thomas Irvine*, bearing date the 23d *February*, 1804, would bind the succeeding warden and poor of the hospital? The case was argued at the sittings at *Serjeants' Inn*, before last *Michaelmas* term, by

Preston for the plaintiff. This is a lease from an hospital while a former lease was in being, and it is therefore void within 13 *Eliz. c.* 10. and 18 *Eliz. c.* 11., unless the old lease be to be expired, surrendered, or ended, within three years next after the making of the new lease. The 18 *Eliz. c.* 11., after reciting 13 *Eliz. c.* 10., which expressly mentions leases to be made by the master or guardian of any hospital, enacts, "Sithence the making of which said statute divers of "the ecclesiastical and spiritual persons and others, "having spiritual and ecclesiastical livings, have from "time to time made leases for the term of twenty-one

 "years

1820.

GRUMBRELL against ROPER.

"years or three lives, long before the expiration of the "former term of years, contrary to the true meaning "and intent of the said statute; be it therefore enacted, "that all leases hereafter to be made by any of the said "spiritual, ecclesiastical, or collegiate persons, or others, "of any of their said ecclesiastical, spiritual, or collegiate "lands, tenements, or hereditaments, whereof any former "lease for years is in being, and not to be expired, sur-"rendered, or ended, within three years next after the "making of any such new lease, shall be void." The lease of 1796 was to expire in 1817, and the other lease was to commence before that period; it was therefore void, within the meaning of this statute, unless the former lease was surrendered within three years. There never was any surrender in fact, and the question is, whether there was any surrender by operation of law. The interest, in both cases, ultimately vested in *Irvine*. The assignment of the first lease to *Irvine* within three years cannot, however, amount to a surrender; for a surrender is a yielding up of an estate by the lessee to the lessor: any other determination must have been by merger. The union, however, of the two terms in the same person, could not operate as a surrender of the interest which existed in the former lease; because there was not, in this instance, any yielding up by the lessee to the reversioner. To bring the case within these acts, there should have been a surrender to the hospital. A concurrence between different tenants to destroy a prior lease, was never contemplated by the legislature. The assignment by *Wainewright* to *Irvine* of the whole legal interest, in the first lease, could not operate as a merger; because the lease of 1804, being a concurrent lease, conveyed only an interesse termini,

to

1820.

GAUMERELL against ROPER.

to commence when the former lease should be ended, and not an actual estate, or an immediate and present term of the reversion. The legislature contemplated a surrender in fact, and not a surrender in law by the operation of merger. It requires an act proceeding from the first lessee to the owner of the reversion, and will not be satisfied with an act arising from the union of two estates by the acts of the second lessee. A concurrent lease can only be surrendered by operation of law, and not by a surrender in fact. *Co. Litt.* 338. *a.* *Bacon's Abridgment*, tit. *Leases*, *Rule* 3. p. 63., and *Wilson* and *Sewell* (*a*) are authorities to shew that there cannot be any merger; because there is not any reversion, but merely an interesse termini. A concurrent lease is not a lease in esse; it operates only by estoppel, and passes no interest whatever during the term granted by the former lease: it does not operate as the grant of a reversion, but as a reversionary lease, in the nature of an interesse termini. If there be no existing estate, there cannot be any merger; for both estates must be vested, in order that a merger may take place. There may be a release of an interesse termini by express words, or a surrender of it by operation of law; but the second lease not having conveyed an immediate vested interest, no second estate existed; and if so, there was not any estate to merge. Besides, Lord *Coke* lays it down that one term for years cannot merge in another.

Marryat, contrà. This is not a lease within the restraining statutes. The 13 *Eliz.* *c.* 10. extends to leases by the master or guardian of any hospital; and the 14 *Eliz.* *c.* 14. declares, that the words " master or

(*a*) 1 *Black.* 617.

guardian

1820.

GRUMBRELL *against* ROPER.

guardian of any hospital," mentioned in the former act, meant all hospitals, maison dieu, bead-houses, and other houses ordained for the relief or sustentation of the poor. The 18 *Eliz. c.* 11. relates only to leases of ecclesiastical, spiritual, or collegiate lands, and not to hospital lands. The 39 *Eliz. c.* 5. authorises the establishment of corporate hospitals, and expressly enacts, that all leases to be made by any such corporation so founded, exceeding the term of twenty-one years, shall be void. Now, if a lease granted by such an hospital was within the restraining statute, this provision would be wholly useless. Besides, this lease is not by the master or warden, but by the corporation, under the corporate seal. This is therefore a valid lease, within 39 *Eliz. c.* 5., and is not affected by the statutes of 13 *Eliz. c.* 10. and 18 *Eliz. c.* 11. Besides, the acceptance of the new lease in 1804 operated to determine the lease in possession; for when the two terms became united in the same person, the former became merged in the latter. At any rate, there is not any authority for saying that an actual lease in possession is not an object of surrender, and that the union of the two terms in one person does not operate as a surrender by operation of law.

Preston, in reply. The 39 *Eliz. c.* 5. merely enabled individuals to convey mortmain for the erection of hospitals. It only took off the restrictions on alienation in mortmain. Under that statute, the lease must be a lease in possession. The 14 *Eliz. c.* 14. contains a declaration extending to all descriptions of hospitals, and therefore they must extend to all hospitals, whether erected before or after the act. It is an established rule of law, that an interesse termini cannot merge in a term for years.

"This

"This case has been argued before us by counsel, and we are of opinion that the lease to *Thomas Irvine*, bearing date *February* 24th, 1804, will bind the succeeding warden and poor of the said hospital."

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

The KING *against* Sir FRANCIS BURDETT, Bart.

Query, whether the mere writing of a libel, with intent to excite hatred and contempt of the king's government, be an indictable offence.

Assuming that the offence is not complete until publication, query, whether it can be tried in any county but in that where the publication took place.

Defendant was indicted for publishing a libel in the county of *L.*; the writing was dated from that county, and the defendant was seen there both on the day of the date and the day following; and the letter was received by *A.* from *B.* in the county of *M.*, open, accompanied with written directions to *B.* to forward it to *A.* for publication. Query, whether this was evidence to go to the jury of an actual publication in *L.*

THIS was an information, filed by his majesty's attorney-general, against the defendant. The first count charged that the defendant, being an ill-disposed person, and intending to excite hatred and contempt of his majesty's government, and particularly among the soldiers of the king, and wishing to have it believed that certain troops of the king, on the 16th of *August*, 1819, wantonly and cruelly cut down certain of his majesty's subjects; did, on 22d *August*, at *Loughborough*, in the county of *Leicester*, compose, write, and publish, and cause and procure to be composed, written, and published, a certain libel, which purported to be an address to the electors of *Westminster*, set out in the information. Plea not guilty. At the trial, before *Best* J., at the last assizes for the county of *Leicester*, it was proved by Mr. *Brooks*, that he, either on the 23d or 24th of *August*, received, in *London*, a letter containing the libel, from Mr. *Bickersteth*, a professional gentleman. The libel was in the form of

1820.

The King *against* Burdett.

an address, in the hand-writing of the defendant, and dated from his residence, *Kirby Park*, which was in *Leicestershire*. He received, at the same time, an envelope, which he had lost; this was also in the hand-writing of the defendant, and had no date either of time or place. The witness did not know whether it bore a post-mark. The envelope contained directions addressed to Mr. *Bickersteth*, to pass it to him, *Brooks*, for publication; he accordingly published it in the *London* newspapers. It was further proved, by a toll-gate keeper, near *Kirby Park*, that he had seen the defendant riding on horse-back, on the 22d and 23d of *August*; the gate was about 100 yards from the defendant's house. It was objected that there was no proof of any publication in *Leicestershire*. The learned Judge was of opinion there was evidence for the jury, and he directed the jury, that, inasmuch as *Brooks* had received the letter open in *Middlesex*, and there was no evidence that it was ever closed; it was open to them to consider whether the defendant had so delivered the letter open to *Bickersteth*, in the county of *Leicester*. If they thought he had, then that was a publication in the county of *Leicester*. The jury found the defendant guilty.

Denman, in *Easter* term, moved for a new trial, on the ground that there was no proof of an actual publication in *Leicestershire*. There was primâ facie evidence that the letter was written in *Leicestershire*, but not the slightest proof that the contents were communicated to any person in *Leicestershire*. The written directions to *Bickersteth*, to forward it to *Brooks*, as well as the description of persons to whom it was addressed, viz. the electors of *Westminster*, shews, to demonstration, that it was the defendant's intention, that the first publication

1820.

The KING against BURDETT.

lication should be in the county of *Middlesex*. There was no evidence that Mr. *Bickersteth* was in *Leicestershire* on the 22d of *August*. The probability, at all events is, that the letter was not delivered open to him, for, in that case, the written directions would be wholly unnecessary, and if not, it is contrary to every probability that the letter should have been delivered open to any other person in the county of *Leicester*. The seven bishops' case is in point. (*a*) As to the causing and procuring the publication, that must mean a causing and procuring a publication of the libel in *Leicestershire*. [*Abbott* C. J. There was evidence of the writing in *Leicestershire*, and *Rex* v. *Beare* (*b*) is an authority to shew, that the writing of a libel is a distinct offence.] That is a case of very doubtful authority. For the essence of the offence is the injury sustained, either by an individual or the public, by communication of the slander to the minds of others, or, in other words, by publication. Until that takes place the reputation of the individual or government cannot be affected; and in this case, no hatred or contempt of his majesty's government could be excited. The publication, in this case, was in *Middlesex*. There the offence was committed, and ought to have been tried. [*Abbott* C. J. At present we see no reason for granting this rule. We will, however, consider the case.]

The Court not having delivered any opinion on the case in *Easter* term, the attorney-general, on *Thursday*, the 8th day of *June*, prayed the judgment of the Court. It was suggested by *Brougham*, in *Denman*'s absence, that he had other matter to urge before the Court pronounced their opinion on the motion for a new trial. Upon which the Court fixed *Saturday* next to hear

(*a*) 12 *How. State Trials*, 264. (*b*) 1 *Ld. Raym.* 414.

Denman,

1820.

The KING *against* BURDETT.

Denman, and it being suggested, that *Denman* might be prevented from attending that day, the Court said, that in that case, they would hear some other counsel on the same side. And now, in *Denman's* absence,

Phillipps made three points. First, the mere writing of a paper, not followed by publication, is not an offence by the law of *England*, however slanderous or seditious that writing may be. If this proposition is true, then the verdict cannot be sustained on the mere ground, that the defendant *wrote* in *Leicestershire*. Secondly, the defendant could not be legally tried in the county of *Leicester*, unless there was a publication in that county. Thirdly, there was not any proof of the fact of publication in *Leicestershire*. Upon the first point, the case of *The King* v. *Beare* (a) is the strongest authority in support of the doctrine, that the mere writing without publication, constitutes the offence of libelling. But the reasoning of the Judges in that case, will be found very unsatisfactory; none of the authorities there cited support the doctrine, that the mere writing of a libel, without publication, constitutes an indictable offence. The first authority cited is 3 *Instit.* 174. In that case, *John de Northampton*, an attorney of the King's Bench, wrote a letter to *John Ferrers*, one of the king's counsel, reflecting on the conduct of the Judges of the court. The writing, however, of a letter to another, respecting the misconduct of a third person, is a publication: for the contents of the letter are communicated and made known. That case is, therefore, an authority to shew,

(a) 1 *Ld. Raym.* 414. *Carth.* 407. 2 *Salk.* 417. *Rep. Temp. Holt*, 422. 12 *Mod.* 219.

that

that the writing becomes an offence, when it is once published and communicated to a third person, but not that the mere writing is of itself an offence. The next authority cited by Lord *Holt*, is from the civil law. By that law, however, as understood by the best commentators, the offence of libelling is not complete without publication. The passage referred to by Lord *Holt*, is in these words, "Injuria autem committitur, non solum cum quis pugno pulsatus erit, &c., sed et si quis *ad infamiam alicujus* libellum aut carmen scripserit composuerit ediderit dolove malo fecerit quo quid eorum fieret." The words *ad infamiam alicujus*, must apply to each of the words *scripserit*, *composuerit*; and the writing cannot tend *ad infamiam*, unless it is shewn or made known to another. It is the tendency to excite public contempt or ridicule, that makes the writing libellous. In the pandects of Justinian, tit. 10. De injuriis et libellis famosis, sect. 4. there is this passage: "De senatus consulto adversus famosos libellos. De judicio ita Ulpianus, Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, dolove malo fecerit, *etiamsi alterius nomine ediderit*, vel sine nominé, et si condemnatus sit, qui id fecit, intestabilis ex lege esse jubetur." Then follows this passage: "Eâdem pænâ ex senatûs consulto tenetur, etiam qui epigrammata (id est inscriptiones) aliud ve quid sine scripturâ in notam aliquorum *produxerit*, item qui emendum vendendumve curaverit." The word *produxerit* is strongly expressive of publication or public exhibition. From these passages, it appears, that a publication is clearly implied and considered necessary, to complete the offence. The words are exceedingly strong, "etiamsi alterius nomine ediderit;" they assume the point, as clear, that there must be a publication, and then state,

not

1820.

The King against Burdett.

not that the writer of a libel shall be punished for mere writing; but that if a person write *ad infamiam alicujus*, &c., *although he publish in another's name*, or anonymously, he shall suffer such a punishment. The very manner and terms, in which this is stated in the Roman law, respecting the punishment of libelling, shews, incontrovertibly, that the publication is essential. The law is speaking only of the case where a publication has taken place; and the passage in the Institutes has been so understood and explained by the best commentators. Heineccius, in his Elementa juris civilis, De injuriis, tit. 4., commenting on this passage in the Institutes, says, "Cum ergo contumelia hæc vel dictis vel factis alteri fiat sequitur ut injuria sit vel verbalis vel realis. Ad priorem etiam injuria scripta et famosus libellus; id est integrum scriptum *ad alterius infamiam editum*, sive anonymon sive pseudonomon sive auctoris nomine insignitum." Thus, Heineccius, defines a libel to be *Scriptum ad alterius infamiam editum*; he therefore considers, that publication, in the civil law, was an essential ingredient in the offence of libel. These authorities shew, that by the law of Justinian, which is supposed by Lord *Holt* to have been transferred into the *English* law, the mere writing without publication is not an offence. The other authorities referred to by the Judges in *Rex* v. *Beare*, are from the Court of Star Chamber. They are *Barrow* v. *Lewellyn* (a), *Hicks*'s case (b), and *Edwards* v. *Wooton*. (c) Another case, referred to as in Dyer, 372., is not to be found. In all these cases there was a publication; the contents of the writing having been communicated and shewn. In *Barrow* v. *Lewellyn*, the plaintiff preferred

(a) *Hob.* 62. (b) *Ibid.* 215. (c) 12 *Coke's Rep.* 35.

a bill

1820.

The King *against* Burdett.

a bill in the Star Chamber against the defendant, "for writing unto him a despightful and reproachful letter, which, for ought appeared to the Court, was sealed and delivered to his own hands, and never otherwise published. And it was resolved, that though the plaintiff in this case could not have an action on the case, because it was not published, and, therefore, could not be to his defamation, without his own fault of divulging it; and all actions of that kind do suppose in auditu quam plurimorum propalavit, &c.; yet the Star Chamber for the king doth take knowledge of such cases, and punish them, whereof the reason is, that such quarrellous letters tend to the breach of the peace, and to the stirring of challenges and quarrels; and, therefore, the means of such evils as well as the end are to be prevented." This case then determined, that a person might be proceeded against, criminally, for writing a letter to another, provoking him to a challenge. *Hicks*'s case is of the same description, and open to the same observation; and the case of *Edwards* and *Wooton* only establishes, that if a person write an abusive letter and send it to another, he is liable to be indicted. These cases, therefore, most manifestly do not establish the doctrine advanced in *Beare*'s case, that the bare writing, without publishing, is criminal. In *Lamb*'s case, which is mentioned in *Rex* v. *Beare* (*a*), it is true, the Court decided, not only that the publisher would be guilty, but that others of the defendants connected with him, in the joint purpose, viz. the contriver of the libel, and the procurer of the contriving, would also be guilty of the offence. But, it is to be observed, the Court was then speaking with reference to the case of a libel published, and in a case where the proof of publication was

(*a*) 9 *Co. Rep.* 59.

 essen-

1820.

The King *against* Burdett.

essential. The resolution of the Court in that case, only relates to the liability of the contriver of a libel that has been actually published, and does not touch the present question, whether the writer or contriver of an unpublished libel is liable. These are the several authorities relied upon by the Court in *Rex* v. *Beare*. There is not one case among them which shews, that the mere writing of a paper, however slanderous or seditious it may be, if not followed by a publication, is a crime by the law of *England*. The doctrine is not even suggested in any of them; and the civil law, from which Lord *Holt* supposes the common law to have borrowed its doctrine on the law of libels, did not punish a libel until followed by publication. Neither is the reasoning of the Court in *Beare*'s case satisfactory. In the report in *Carthew*, it is stated, that the Court held, "that transcribing and collecting this libellous matter was highly criminal, without publishing it, and that it was of dangerous consequence to the government; for though the writer or collector never published these libels, yet his having them in readiness for that purpose, if any occasion should happen, is highly criminal; and, though he might design to keep them private, yet, after his death, they might fall into such hands as might be injurious to the government; therefore, men ought not to be allowed to have such evil instruments in their keeping, &c." Now there can be no danger to the government, if the writer keeps the libel in his own possession, without communicating its contents. In the case of a libel against an individual, it is established law, that a party cannot maintain an action, unless the libel has been published; and upon no sound principle can a different principle be adopted, when the interests of government are concerned. As to having the libel in readiness for pub-

1820.

The King *against* Burdett.

publication, the observations upon that by the Court were without foundation, for the jury had absolutely negatived the fact; and as to the observation, that although the defendant himself might design to keep the libels private, yet, after his death, they might fall into such hands as might be injurious to government, that is a mere possibility of a future injury, which may or may not happen. The libel may, perhaps, be lost or destroyed by the writer himself, at some future time; but even if he keeps it to the hour of his death, there is no just cause for apprehension; for in case any person should publish it afterwards, he will be amenable to the law as publisher. The publication will not pass unpunished; when the injury occurs, it will be stopped and redressed; and a person is not punishable for writing a paper, merely because, by possibility, at some future time, if it should be published, it may turn out to be mischievous. The object of punishment is, to prevent an existing evil. A libel is punished for its direct and immediate tendency, and for that alone. According to the reasoning of Lord *Holt*, if a man writes a libel, and keeps it locked up, and a servant clandestinely takes a copy, the writer is guilty of a crime. It may as well be said, however, that a man may be punished for keeping poison locked up in his closet; because it is not impossible, that some other person may take it and be poisoned. But Lord *Holt*(*a*) further says, that the writing of a libel is criminal, and to prove this, he said he would consider in what a libel consisted. "It is not the infamous matter or words which make the libel; for if a man speak such words, unless they are written, he is not guilty of the making of a libel, for

(*a*) 1 *Ld. Raym.* 416.

 the

1820.

The King *against* Burdett.

the writing is essential to a libel; and, therefore, if a person writes such matter, he becomes a libeller, for it is not a libel before it was written." It is true, that it is not a libel until it is written, but it does not thence follow, that, when written, it becomes punishable. Lord *Holt* then continues "That in all cases where a man does the act, which act causes the thing to be what it is, that man ought to be construed the doer of such a thing. This rule proves itself, as well in all the great offences, as in all the least. If *A.* contrives treasonable matter, and *B.* writes the whole contrivance, *B.* is guilty as well as *A.* The same law is, in the lowest offences, where all are principals; as, if *A.* holds *B.*, while *C.* beats *B.*, *A.* is guilty of the battery. It would be very strange, then, if, in this case only, he who contributes so much to the doing of the thing (as he who writes, does in this case of the libel) should be construed innocent." In this passage, Lord *Holt* is considering the situation of several persons concerned in a joint illegal purpose. He supposes *A.* to compose a libel, *B.* to write, and *C.* to publish it; undoubtedly they are all liable. So in the other cases, where *A.* is supposed to hold *B.* while *C.* beats him, *A.* is as guilty as *C.* The battery is *complete*, and the person who assists is equally liable with the person who does the act. But with respect to libelling, the offence is not complete till the publication takes place. Lord *Holt*, at any rate, does not prove the contrary. Whether, in every case of publication, the writer is guilty as well as the publisher, must depend upon circumstances. If several persons are concerned in one joint illegal act, as in the case put by Lord *Holt*, all are guilty; but if the publication is without the knowledge of the writer, he may not be guilty.

guilty. It is to be observed further, on *Beare's* case, that the doctrine there advanced does not appear to have been generally approved. Lord Ch. B. *Comyns*, tit. *Libel*, *B*. 2., does not adopt the doctrine, that bare writing without publication is a crime. And he was evidently aware of the case of *Rex* v. *Beare*, for he controverts one of the opinions of Lord *Holt*, as to the copying a libel, and then gives his own opinion on the point, and says *Semble* contrà *Salkeld*, 418., which is a reference to *Beare's* case. His silence with respect to this doctrine, shews that he did not assent to it. And in *Entick* v. *Carrington* (*a*) Lord *Camden* seems not to have approved of that case. Upon these grounds, the case of *Rex* v. *Beare*, therefore, can neither be supported upon principle or authority. The case of *Rex* v. *Payne* (*b*), decided about the same time, will probably be relied upon by the other side; the defendants were there indicted for composing, making, writing, and publishing a libel upon the late king and queen, and their government. The jury acquitted the defendant as to the publishing of the libel, and as to the rest, found a special verdict to this effect, viz.; that the defendant wrote the libel, dictated by a person unknown to him and the jury, and the stranger dictated as the defendant wrote. The Court held, that the facts found did in law amount to the making and composing a libel. The argument turned entirely upon this point, and the question, whether the bare writing, without publication, was an offence, did not arise. In point of fact, there was a publication in that case, though the defendant was acquitted of that part of the charge, and it was so de-

(*a*) 19 *Howel's State Trials*, 1072. See *Starkie on Libels*.
(*b*) *Carth*. 405. 5 *Mod*. 163. *Cas. temp. Holt*, 294.

1820.

The KING *against* BURDETT.

clared by the Court (*a*), and, therefore, the proposition there laid down, that the writing of a libel, though never published, is criminal, was not warranted by the facts of the case. The true construction of the passage in *Payne's* case, as in *Lamb's* case, is, that where two persons are concerned in one joint design of libelling, and one writes the libel which the other publishes, such a writing or making of a libel is an offence, though the writer himself did not publish it; and if so, that decision does not apply to the present question. Besides, *Payne's* case was adjourned, and it does not appear that any judgment was ever pronounced. Perhaps it may be said, that the case of *Rex* v. *Knell* (*b*) is an authority to shew, that a defendant charged with printing and publishing, may be convicted of the printing and acquitted of the publishing; and, therefore, that by parity of reasoning, a party may be acquitted of the publishing and convicted of writing. The cases, however, are not analagous. In that case, there was, in point of fact, a publication of the libel, though the defendant was not concerned in the publication, but merely printed it. Now it does not follow, because the printer of a libel, which is afterwards published by some other person, is punishable for printing, that a person who only writes what he keeps to himself, and what is never afterwards published, is therefore punishable; for the printing of a libel is an act done, by which the printer not only prepares the work for the inspection of others, but he strikes it off, and puts it out of his possession. Although he takes no part in the actual publication of the work, yet he puts it in a

(*a*) See 5 *Mod.* 167. (*b*) 1 *Barnadiston Rep.* 305.

form

form for publication. He does not keep the work to himself; on the contrary, his business is to have it seen, perused, and examined, by others. Printing, therefore, is considered, by *De Grey* C. J., in *Baldwin* v. *Elphinstone* (a), as, primâ facie, a species of publication. But the question, in this case, is whether a person is criminal, who merely writes, but does not publish or disclose the writing to any one. The distinction between *Knell's* case and this is obvious; what the writer does is secret, what the printer does is open and public. The one writes for his own perusal, the printer prints for the perusal of others. The one keeps what he writes to himself, the other gives out what he prints to be revised. Although, therefore, the writer of a newspaper may be punishable for the mere printing, it by no means follows, that the writer of a libel is punishable without a publication. If the above-mentioned cases may be cited on the other side, we have authorities on our side to shew, that the writing of a libel without publication is not an offence. Lord C. B. *Comyns*, tit. *Libel*, letter *A.*, thus defines a libel. "A libel (libellus famosus) is a contumely or reproach, published to the defamation of the government of a magistrate or of a private person;" and he adds, "it may be in writing." A written libel, then, as the Lord C. B. *Comyns* understands the term, is, a writing *published* with a slanderous tendency; and that definition, corresponds, almost to the letter, with the definition given by the commentator on the civil law, who describes a libel to be, Scriptum editum ad infamiam alicujus. According to the opinion of C. B. *Comyns*, publication is,

(a) 2 *Black.* 1038.

1820.

The King *against* Burdett.

therefore, essential. *Hawkins*, in his Pleas of the Crown, *b.* 1. *c.* 73. *s.* 1., says, "It seemeth that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. But it is said, that in a larger sense, the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner." This passage most clearly demonstrates, that in the opinion of *Hawkins*, a writing is not punishable, until its contents are made known; for, until that happen, it is impossible that the object of the slander can be exposed to public hatred, contempt or ridicule. The writing has no tendency to defame, as long as it is kept locked up in a writing-desk. It is the publication, and that alone, by which the impression on the public mind is produced. And until the publication takes place, no civil injury is suffered, and no public offence is committed. In *Entick* v. *Carrington* (*a*), Lord *Camden*, in speaking of the offence of libelling lays down the law in these words. "It is the publishing of the libel which is the crime, and not having it locked up in a private drawer, in a man's study." And Mr. Justice *Blackstone*, in his Commentaries (*b*), has this passage. "Of a nature very similar to challenges are libels, libelli famosi, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but in the sense

(*a*) 19 *Howell's State Trials*, 1038. (*b*) 4 *Black. Com.* 150.

under

1820.

The King against Burdett.

under which we are now to consider them, are malicious defamations of any person, and especially a magistrate made *public*, by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels, is the breach of the public peace, by stirring up the objects of them to revenge, and, perhaps, to bloodshed. The communication of a libel to any one person, is a publication in the eye of the law; and, therefore, the sending an abusive private letter to a man, is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. And in the same page, he says, "In a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers." The same admirable writer, in a following page (*p.* 152.) after saying, that if a person publish what is improper, mischievous, or illegal, he must take the consequence of his temerity, adds these words: "Neither is any restraint hereby laid upon freedom of thought or enquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials." Sir *W. Blackstone* therefore holds, that a bare writing, not followed by a publication, is not criminal.

The defendant could not be legally tried in the county of *Leicester*, unless the publication were in that county. The general rule is thus laid down, in 2 *Hale P. C.* 163. "the grand jury (and the same rule applies also to the petit jury) are sworn ad inquirendum pro

cor-

1820. The King against Burdett.

corpore comitatus, and, therefore, they cannot regularly enquire of a fact done out of that county, for which they are sworn, unless specially enabled by act of parliament, but only in some special cases. This must be understood to mean, that if the main fact charged against the prisoner, appear to have been done out of the county for which the jury are sworn, the jury cannot regularly enquire into it; for the jury may enquire, incidentally, into facts done out of the county, if those facts are proved merely as evidence to substantiate the main charge; for instance, they might enquire on the principles of the common law, into overt acts of treason committed in another county, or into the fact of a confession made by the prisoner in another county. In *Hawkins*, Pleas of the Crown (*b.* 2. of Indictment, *c.* 25. *s.* 35.) the rule is thus laid down. "Of whatsoever nature an offence indicted may be, whether local or transitory, as seditious words, or battery, &c. it seems to be agreed, that if upon not guilty pleaded, it shall appear, that it was committed in a county different from that in which the indictment was found, the defendant shall be acquitted." And C. B. *Comyns* says in his Digest, tit. Action, N. 9., "An indictment must be in the county where the offence was committed; and, therefore, if the indictment for a forcible entry into land in *Middlesex* be found in *Gloucester*, it will be void. So if an indictment for words or other transitory thing be in a county where the words were not spoken, or the thing not done, upon not guilty the defendant ought to be acquitted." This rule, therefore, is applied universally to all criminal cases, to misdemeanors no less than to felonies. Indeed, the examples put both by *Hawkins* and C. B. *Comyns*, to illustrate the rule, are cases of mis-

misdemeanors. It is clear, also, that *Hawkins* intended to apply the rule as well to the case where the beginning of the offence is in one county, and the completion of it in another, as to the case where the entire offence is both begun and completed in the same county; for the very first instance put by him in illustration of the general rule, is that in which he supposes a wound to be given in one county and death to ensue in another; in which case, as he says, the trial could not have been in either county, by the common law. Upon these authorities, it appears, that in all cases, whether of felonies or misdemeanors, the party charged can only be tried in the county where the offence is committed, that is, where the offence is complete; and, therefore, in the present case, only where the publication took place. It is, indeed, suggested in Mr. Starkie's valuable work on Criminal Pleading, p. 25., that this rule has not been so strictly observed in misdemeanors as in capital cases; and he cites several authorities in support of that position. In all of them, however, it will be found that a complete indictable offence was committed in the county in which the party was tried. In the first of the cases cited by him, *Danby's* case (*a*), *Danby* and four other persons were concerned together in making erasures and alterations in several parts of the record of a suit against one *Barret*. One of them, *Mundres*, made an erasure in the original writ in *London*, the rest made erasures in other writs, part of the same proceedings, in *Westminster*. They were all tried for a misprision of felony; *Mundres* in *London*, the other four in *Middlesex*. The Judges held, that the whole of what had been done by the parties concerned, made one entire

(*a*) 1 *Hale P. C.* 652. *Year Book*, 2 *R.* 3. *p.* 10.

tire

1820.

The King *against* Burdett.

tire felony, part of which had been committed in *Westminster*; but the principal part, viz., the erasure of the original writ, in *London*. And since one and the same felony could not be enquired of in different counties, the parties were therefore indicted for the misprision and not for the felony. It is clear from the statement of this case, that there was a misprision in each county; a complete indictable misdemeanor had, therefore, been committed in each. Mr. *Starkie* then observes, "that it has been held, that a man who has been guilty of a nuisance in one county to the damage of another county, might be indicted in the first, or, according to *Hawkins*, in either county. The cases referred to are, *Lib. Ass.* 19 *Edw.* 3. *pl.* 6. *Stamf. P. C. lib.* 2. *p.* 91. It appears from the book of assize, that a commission issued to certain persons, to enquire of a nuisance in the river *Ley*, which runs into the *Thames*, which nuisance was caused by means of trenches and piles made in the river *Ley* for turning the water, in consequence of which no vessels could pass as they had been accustomed, to the nuisance of the city of *London*. Now here the nuisance was complete in the county where the piles were fixed and the trenches cut; and, therefore, in that county, it could be properly enquired into. So, also, if a person in the county of *A.* does an act which operates as a nuisance in the county of *B.*, (as, if such act in the county of *A.* were to cause a river to overflow in the county of *B.*, or to divert its course in the county of *B.*,) he may be properly indicted in *B.*, for here he has been guilty of a nuisance, and committed an offence. There is, however, no authority to shew, that if a person were to do an act in the county of *A.*, which is not a nuisance there, but which

operates

1820.

The King *against* Burdett.

operates as such in the county of *B.* alone, he might be tried for a nuisance in the county of *A.*, though he might certainly be tried in the county of *B.* To apply this to the present case, the defendant wrote the paper in *Leicestershire.* That, of itself, was not an offence, and, therefore, he could not be tried in *Leicestershire*; but he published it in *Middlesex*; there, consequently, the trial ought to be. The third instance, put by Mr. *Starkie*, is the case of an indictment for the non-repair of a bridge: "if *A.*, by reason of certain lands in the county of *B.*, is bound to repair a bridge in the county of *C.*; if the bridge be in decay, he may be indicted in the latter county." In this case, the injury arises from the neglect to repair the bridge. The offence, therefore, is committed in the county of *C.*, in which the bridge is situated: there, consequently, it ought to be tried; and the party liable to repair could not be tried in the county of *B.*, because the injury and the offence was not in that county, but in *C.* So in this case, the injury arises from the publication, and not from the writing, and the trial should be in the county in which the publication was. The next case cited is that of *Scott* and *Brest.* (*a*) That was an action for penalties; the usurious contract was made in *London*; the lender received money, as the borrower's agent, in *Middlesex*, but deducted the usurious interest, on accounting for the receipts, in *London*; and *Ashhurst* J. held that the action was properly brought in *London*, because the usury was not complete until the account was settled, and the account was settled in *London*; or, in other words, the action was properly brought where the offence of usury was complete. Now, as the offence of libelling was not complete in *Leicestershire*, the

(*a*) 2 *T. R.* 238.

1820.

The KING *against* BURDETT.

the defendant could not be there tried. In the case of *Scott* v. *Brest*, *Ashhurst* J. indeed intimated an opinion that the action might have been brought either in *London* or *Middlesex*, since, if the foundation of the action arose in two counties, the plaintiff may lay the venue in either. Assuming that the action for penalties may be brought in the county where the usurious contract took place, although the offence was completed in another county, for which there seems to be no authority, except the extrajudicial opinion of *Ashhurst* J., still there always has been a distinction in this respect between actions and indictments; and although in civil cases the rule is, that where one matter in one county is depending upon matter in another, there the plaintiff may choose in which county he will bring his action; yet, in all criminal cases, the only true principle is, that the defendant is to be tried in that county, and in that only, where the offence is complete. Another case, cited in *Starkie*, is the case of an indictment for a conspiracy: "An indictment for a conspiracy," he says, "may be tried in any county in which an overt act has been committed, in pursuance of the original illegal combination and design; as in the case of *Rex* v. *Brisac* (*a*), where several conspired upon the high seas to fabricate false vouchers, to defraud certain commissioners in *Middlesex*, and in consequence those vouchers were delivered by innocent persons, their agents, in *Middlesex*. The Court intimated an opinion that the offence had been properly tried in *Middlesex*, in analogy to the case of treason, which offence may be tried in any county in which an overt act has been committed. So in the case

(*a*) 4 *East*, 164.

of

of *Rex* v. *Bowes* (*b*), referred to in *Rex* v. *Brisac*, it was held that several defendants were properly convicted on an indictment for a conspiracy, although no actual conspiracy had been proved in the county where they were tried, and though the overt acts of some of the conspirators were in other counties. The principle upon which those cases were determined is very consistent with, and illustrative of, the truth of the doctrine, that in a criminal case the trial must be in the county where the offence is completed; for the delivery of the false vouchers, in the first case, by agents, who were ignorant of their contents, was a delivery by the principals: it was considered as much their act, as if it had been done by their hands. Now, this act so done by them, proved their conspiring mind in *Middlesex*: the conspiracy continued there, consequently they were properly tried for the conspiracy in *Middlesex*. Conspirators may undoubtedly be tried for a conspiracy, either in the county where the conspiracy originated, or in the county where the conspiracy is proved to have been continued and carried into execution. The defendants, therefore, in the two cases cited by Mr. *Starkie*, were properly tried in *Middlesex*, because their offence was complete in that county. Upon the same principle, the trial proceeded in the case of *Rex* v. *Bowes*. In that case, there was no attempt made to prove an actual conspiracy in *Middlesex* embracing all the several conspirators, and the individual actings of some of the conspirators were wholly confined to other counties than *Middlesex*; but the conspiracy having been proved as against all from the community of criminal purpose, and by their joint co-operation in

(*a*) 4 *East*, 171.

for-

1820.

The King *against* Burdett.

forwarding the objects of it in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had. (*a*) Now, here the acts of a part of the conspirators, done in pursuance of a conspiracy, are the acts of all the persons engaged in that conspiracy, whether present or absent when such acts are committed. If the crime admitted of accessaries, those only would be liable as principals who were present at the time of the commission of the overt acts; but in the case of conspiracy, as also in the case of treason, there are no accessaries, all are principals; the acts of some of the conspirators, in pursuance of the joint illegal design, are, in consideration of law, absolutely and essentially the acts of the whole set. The overt acts done by some of the party in one county, while the rest may have been absent in another county, prove the continuance of the conspiracy in the county where the overt-acts were committed. In that county, therefore, the whole band of conspirators may be tried; for although absent, they are as strictly responsible in point of law, and in point of common sense, for all the acts of any of the set done in pursuance of the joint conspiracy, as if they had been present, and had themselves committed the overt-acts. When once the defendants are proved to be connected with each other in one illegal purpose (no matter by what medium of proof, whether by proof of their meeting together at the formation of the original conspiracy, or by proof of overt acts done by each of them separately, at different times, and in different counties, but all of those overt-

(*a*) See 4 *East*, 171.

acts

1820.

The KING *against* BURDETT.

acts co-operating for one common end, and promoting one general object), they thenceforth share a community of criminal purpose, and they are all alike responsible for the separate actings of each other, in whatever county such illegal actings may be. And the Court of King's Bench, so far from making a distinction in favour of the case before them, as being a case of misdemeanor, expressly determined it, from analogy, to the case of treason. "There seems to be no reason," they said, (p. 171.) "why the crime of conspiracy, amounting only to a misdemeanor, may not be tried, wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason, in compassing the king's death, or in conspiring to levy war." The defendants, therefore, in the two cases cited by Mr. *Starkie*, were properly tried in *Middlesex*, because their offence was complete in that county.

It may perhaps be argued, that if the defendant did not publish the libel in *Leicestershire*, he at least caused in *Leicestershire* the letter to be published elsewhere, and that such causing being of itself criminal, and having been in *Leicestershire*, the defendant might properly be tried there for such criminal act, and that the verdict may on this ground be supported. Now first, in point of fact, there was no proof of this causing having been in *Leicestershire*, for the writing was not a causing to be published, and if the envelope, which accompanied the letter, is insisted on as the supposed causing, there was no evidence of this envelope having been written in *Leicestershire*; for it had no date either of time or place. The argument is, however, inconsistent with the plain and obvious construction of the averment in the inform-

 ation.

1820. The King *against* Burdett.

ation. The averment is, that the defendant, at *Loughborough*, in the county of *Leicester*, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain libel, &c. &c. Now the plain meaning of this averment is, that all this was done in *Leicestershire*; namely, that he published it in *Leicestershire*, and caused in *Leicestershire* the paper to be published in *Leicestershire*. The meaning of the averment cannot be, that he caused in *Leicestershire* the publication to be elsewhere, for the information would be inconsistent with itself, if it were construed to say in one part of the averment that the publication was in *Leicestershire*, and in another part to say that it was elsewhere. That this is the correct construction seems to be established by what the Judges said in the case of the *Seven Bishops* (a) on the subject of the averment in that case, which was nearly the same as in this information. The information, in that case, stated that the defendants, "apud *Westmonasterium*, in comitatu *Middlesexiæ*, illicite, malitiose, &c. fabricaverunt, composuerunt, et scripserunt, et fabricari, componi, et scribi, causaverunt, et eundem falsum, &c. libellum, manibus suis respectivè subscriptum, die et anno et loco ultimo mentionatis, publicaverunt, et publicari causaverunt." It was insisted for the crown, that if there was not actual proof of publication by the bishops in *Middlesex*, that at least there was a causing by the bishops to be published there; but, after much argument the Chief Justice said, "that the information was for writing, composing, and publishing, and causing

(a) 12 *Howell, St. Tr.* 253.

to

to be published, and *all this is laid in* Middlesex." So, in this information, the venue in *Leicestershire* applies to every part of the averment. The meaning of it is, not that he caused in *Leicestershire* the publication of it to be elsewhere, but that he caused the publication of it to be in *Leicestershire*. Another answer to such an argument is the following, which seems to be decisive. If the defendant has caused or procured in *Leicestershire* a libel to be published in *Middlesex*, he has done an act, which, if the charge amounted to felony, would make him an accessary. But this is the case of a misdemeanor, and in misdemeanors there are no accessaries; consequently the defendant could only be tried as principal, that is, for publishing the libel, and not for causing or procuring it to be published. And as principal he could only be tried in that county, where the fact of the publication took place. In *Gawen* v. *Hussee and Gibbes*, *Dyer*, 38. *a.* a question arose as to the proper place for the trial of an appeal of robbery against accessaries. In p. 39. *a.* it is said, "If a man procure or command one to do a trespass in another county, the action shall be brought against the commander or procurer, where the fact was committed, because there all are principals." And in page 40. *a.* two of the Judges said, "There is a difference where an act grows and tends to a felony, and where only a trespass, as to the nature of the action; for in the first case, if an abetting or procuring be in one place, and the act be done in another county, the accessary is guilty, but that is where his procuring was; but in the other case he is no accessary, but all are principals in trespass: and, therefore, although the command was in one county, and the trespass in another, yet all are principals where the act was done." This doctrine, so

 applied

1820.

The King *against* Burdett.

applied to the case of a trespass, in which there are no accessaries, is equally applicable to the case of a misdemeanor, which, like trespass, does not admit of accessaries, but involves all as principals. The same principle might be illustrated by the rule as to the place of trial in cases of treason, in which also there are no accessaries. If the offence of libelling admitted of accessaries, the defendant would be guilty, as accessary, in causing the letter to be published, and if that causing were in *Leicestershire* he might there be tried; but, inasmuch as he is only amenable as principal, he ought to be tried in that county where the publication took place, that is, where the principal offence was committed. In the case of *Rex* v. *Johnson* (*a*), the defendant was tried in *Middlesex*, where the libel was published by his procurement; and Lord *Ellenborough*, in that case, said, "Here there is no question of the fact of publication by Mr. *Cobbett*, in *Middlesex*, of that which is admitted to be a libel; and the only question is, whether the defendant was accessary to that publication; for one who procures another to publish a libel, is, no doubt, guilty of the publication, in whatever county, it is, in fact, published in consequence of his procurement." In the case, also, of *Rex* v. *Coombes* (*b*), it was held, that a person, who, as he was standing upon the shore, shot a man upon the high seas, was guilty of the offence upon the high seas; for, as Mr. *Starkie* says, after stating the case (*p*. 21.), the offence was committed where the death happened (or rather where the wound was inflicted), and not at the place whence the cause of the death proceeded. For these reasons, whether the charge be publishing or

(*a*) 7 *East*, 65.

(*b*) 1 *Leach*, *Cr. L.* 432.

causing

causing to be published, the defendant could only be tried legally in that county, in which the libel was actually published.

Thirdly. There was no proof of the publication of the libel in *Leicestershire*. The facts proved were these; the libel was dated, *Kirby Park*, 22d *August*; the defendant was seen on horseback, by a toll-gate keeper, near *Kirby Park*, which is in *Leicestershire*, on the 22d, and on the 23d of *August*. The letter was received by *Brookes*, together with an envelope, open, from Mr. *Bickersteth*; the direction on the envelope is not known, but in the envelope was writing of the defendant, requesting Mr. *Bickersteth* to pass the letter to *Brookes* for publication; in consequence of which, *Brookes* published it in the newspapers. Here is no proof of a publication in *Leicestershire*; no proof of the contents of the letter having been there divulged or made known. There is no proof whatever of the letter having ever been seen in *Leicestershire*. The first publication that appears on this evidence, was in *Middlesex*; there it was first found in a state of publication. *Brookes* received it from *Bickersteth*, so that *Bickersteth* is the first person who is proved to have had it in his possession, from the time that it first passed from the hands of the defendant. It cannot be presumed, without proof, that *Bickersteth* received the letter from the hands of the defendant in *Leicestershire*. A fact cannot be presumed, either in good sense or in law, without some fact as a groundwork, from which the inference may be reasonably and fairly drawn. So far from there being any ground to suppose that *Bickersteth* was in *Leicestershire*, the presumption is the reverse; for the envelope contained directions to *Bickersteth* to pass the letter on to

 Brookes;

1820.

The King *against* Burdett.

Brookes; from which it is clear, that *Bickersteth* could not have received it from the defendant; for, in that case the written directions in the envelope would have been wholly unnecessary. Nor can it be presumed, that, because the letter was opened in *Middlesex*, it must have been delivered open in *Leicestershire*. Admitting, for the purpose of the argument, that the letter, by some means or other, was transmitted to Mr. *Bickersteth* from *Leicestershire* (not that there is any proof of its having been so transmitted), the presumption is, that it was not transmitted open, for the circumstance of an order being given to *Brookes*, who was in *Middlesex*, to publish the letter, shews, that *Middlesex* was the first place in which a publication was intended. If the letter inclosed in the envelope was sent by a servant, it would be sent sealed; if by the post, it would also be sent sealed; that is the ordinary, universal practice, and it could be otherwise only by accident; and if the jury are to presume any thing, they ought to presume what is most usual, and according to the common experience and practice of mankind, and not what is singular, and out of the range of probability. If the letter had been sent by the post, that would not have been a publication in *Leicestershire*. For, suppose a person were to write a letter to a friend, containing a libel, and put it into the post in the county of *Leicester*; if this be a publication, the offence is complete, and at that moment the writer is liable to be indicted; suppose, however, that the writer, anxious to recover the letter before its contents are known, and apprehensive of the consequences of discovery, were instantly to set off and arrive before the delivery of the letter, and were to reclaim it from the person to whom it was addressed, and were to receive it back again before it was opened;

opened; now, if after this he should be indicted, and the contents of the letter should be proved by one who had clandestinely perused it before it was put into the post, would it not be against all good sense to contend that under such circumstances there had been a publication. And, for the same reason, if the letter had been delivered to a servant in *Leicestershire* for the purpose of being published in *Middlesex*, that would not be a publication in *Leicestershire*. But there is no necessity for arguing this point; for there was no evidence of either fact, nor is there any evidence that the letter passed out of the defendant's hands in *Leicestershire*. It was proved, indeed, that he was seen in *Leicestershire* on the 22d of *August*, the day on which the letter bore date, riding near *Kirby Park*, and seen once on horseback also on the 23d; but it is not, therefore, to be presumed against a party charged with an offence, that he continued for the whole of those days in *Leicestershire*, in order to raise another presumption, that on one of those days the letter passed out of his hands in *Leicestershire*. That would be contrary to the principle of the *English* law, by which the presumption is always in favour of innocence, until guilt be proved. It would be contrary, also, to another principle, which is, that in a criminal case a fact is not to be presumed, if such a presumption would contravene the presumption of innocence. Thus, in civil cases, it is usual to presume, that the life of an individual continues, until his death is proved; but this presumption cannot be made in a criminal case, where the consequence of such presumption would be to impute guilt to the defendant. The Seven Bishops' case bears strongly upon this part of the case. It was there proved that the archbishop and bishops were at the council table. It was proved, also, that the petition, which was charged against them as a

 libel,

1820.

The King against Burdett.

libel, had been before that time signed by them, and that the petition was seen in the hands of the king in their presence. The counsel for the bishops insisted that there was no proof of the defendants' having delivered the petition to the king in *Middlesex*, in other words, that there was no proof of a publication in that county: just as it is insisted in this case that there was no proof of the defendant having delivered the letter in question to any person in the county of *Leicester*. The counsel for the prosecution there contended, on the other side, that the jury ought, under the circumstances, to presume that the petition, which at one time had been in the hands of the bishops for their signatures, had passed from them into the hands of the king at the council table. But the Lord Chief Justice, and *Holloway* and *Powell* Justices, said, they would not allow the jury to guess or conjecture; they would presume in favour of innocence that the bishops had not delivered the petition to the king, until the contrary was proved. So, in the present case, it ought to be presumed, until the contrary is shewn, that the libel in question was not delivered by the defendant in *Leicestershire*; in other words, that there was not any publication proved in that county.

Abbott C. J. We are most anxious, where any doubt as to the propriety of a verdict in a criminal case is suggested, that the question should receive the fullest consideration; and we therefore think that in this case the defendant should have a rule to shew cause.

The Attorney and *Solicitor-General* now shewed cause. The writing and composing a libel with a criminal intent, is an offence by the law of *England*, although it be

not

not published. Secondly, admitting the publication to be part of the offence charged in this information, still the composing and writing are other parts of the offence, and the venue may be laid in the county where any part of the offence was committed. Thirdly, there was sufficient evidence of a publication.

That the writing and composing a libel with a malicious intent, whether the libel be published, or whether the publication be intercepted, is an offence punishable by the law of *England*, is established by a current of authorities upon the very point, as well as by the rules of law that apply to offences which bear the strongest analogy to the offence of libelling. In *Lamb*'s case (*a*) it was expressly resolved, that the contriver, the procurer, and the publisher of a libel, were guilty of distinct offences; and from the report of that case in *Moore*, 813., it appears to have been held that the mere writer of a libel was the contriver. This is, therefore, an authority to shew that the writer of a libel is guilty of a distinct offence; and 3 *Inst.* 174., and the cases there cited, are in support of the same doctrine. This case is there stated. *Adam de Ravensworth* was indicted for the *making* of a libel in writing, in the *French* tongue, against *Richard of Snowshall*, calling him therein "*Roy de Raveners*," &c.; whereupon he, being arraigned, pleaded thereunto not guilty, and was found guilty, as by the record appeareth. Lord *Coke* then adds, "So as a libeller, *or* a publisher of a libel, committeth a public offence, and may be indicted therefore at the common law;" It was therefore the opinion of Lord *Coke*, that the maker of a libel, as well as the publisher, was guilty of an offence. He then states the case of *John de Northampton*, who wrote a letter to *John de Ferrers*,

(*a*) 9 *Rep.* 59.

one

1820.

The King against Burdett.

one of the king's counsel, containing slanderous matter respecting the conduct of the Judges of the Court, which said *John*, being called, confessed the said letter to be written with his own proper hand. Et quia prædictus *Johannes* cognovit dictam literam per se scriptam *Roberto de Ferrers*, qui est de concilio regis, quæ litera continet in se nullam veritatem; prætextu cujus dominus rex erga curiam et justiciaros suos hic in casu habere possit indignationem, quod esset in scandalum justic' et curiæ. Ideo dictus Johannes committitur maresc', et postea invenit 6 manucaptores pro bono gestu. In this case, judgment was pronounced against the defendant, who acknowledged only, that he had written the letter, but not that he had published it. That case, therefore, is another authority to shew, that the writing of a libel, without publishing, is an offence by the law of *England*. In *Rex* v. *Paine* (*a*), the information charged the defendant as the composer, author, and publisher of a libel. It appeared, that the defendant wrote the libel, it being dictated to him by another; he afterwards put it into his study, and, by mistake, delivered it, instead of another paper, to one *Brereton*, who transmitted it to the mayor of *Bristol*. The defendant, *Paine*, was afterwards examined by the mayor, and confessed that he *wrote* the libel, but stated that he did neither compose or publish it, but merely delivered it, instead of another paper, to *Brereton*; but it was proved by his servant, that he sent him to his study for a writing, and that he not bringing the paper, sent for the defendant, fetched it himself, and being in a room only with Dr. *Hoyle*, the libel was repeated, but he could not tell by whom; but he remembered the first verse. The jury found a special verdict, that a certain

(*a*) 5 *Mod.* 163.

per-

1820.

The King against Burdett.

person, to them unknown, did pronounce, dictate, and repeat the words contained in the libel which the defendant did write; and that if that will make him guilty of composing and making the libel, then they find him guilty; and as to the publication thereof, they find him not guilty. The Court, after argument, are reported to have said, "That the making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it." It does not appear, indeed, that any judgment was ever pronounced in the case, yet the Court were clearly of opinion, that the dedefendant, by merely writing a libel dictated by another, had been guilty of an offence. Indeed, it is assumed, in the argument of counsel and of the Court, that the person who makes a libel, is guilty of an indictable offence; and the only question debated was, whether the bare transcribing was an offence. The case of *Rex* v. *Beare* (*a*) was decided within three years after that of *Rex* v. *Paine*. The indictment there charged, that the fendant composed, made, wrote, and industriously collected, many false and scandalous libels, one of which was set out. The jury found the defendant guilty as to the writing and collecting, and as to every thing else, not guilty; and the Court held, that the barely writing and collecting was criminal, and judgment was pronounced for the Crown. That case, therefore, is a direct authority, that the writing with a calumnious intent is, in itself, an offence, although there be no publication. It appears to have been conceded, in argument, that the contriver and maker of a libel were guilty of an offence; but the point argued was, that the mere writing of a libel, by a person who was not the author of the libel, was not

(*a*) 1 *Ld. Raym.* 414, S. C. 3 *Salk.* 226.

an

1820.

The King *against* Burdett.

an offence. It is to be observed, too, that there being a special verdict, the defendant might have taken the opinion of a court of error. The judgment of Lord C. J. *Holt* has been already fully stated and commented on; and it has been said, that the authorities referred to from the civil law, do not establish the doctrine in support of which they were cited. It is to be observed, however, that the passages cited from *Justinian's Institutes*, and from the pandects, are in the disjunctive; "Scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret." Each of the acts are put as a distinct offence, and they therefore bear out the proposition, that, by the civil law, the writing of a libel, the composing of a libel, and the publishing of a libel, are distinct and separate offences; and *Vinnius*, in his Commentaries on the Institutes, Lib. 4. tit. 4. *De Injuriis*, lays it down, "Quippe utrumque flagitiosum esse, et componere famosum libellum, et publicare. The current of authority in our law does not stop with *Rex* v. *Beare*, for the same doctrine was afterwards laid down in *Rex* v. *Knell.* (*a*) The information charged, that the defendant printed and published a libel in *Mist's Weekly Journal*. It was proved, that the defendant was a printer's servant, and his business was to prepare the type for printing off, which business was called composing for the press; that the defendant and another composed, together, the libel in question, taking the alternate columns. For the defendant, it was objected, first, that since he took a distinct part, that which he composed could not bear the construction put upon the whole; and, secondly, that since he composed only, he could not be

(*a*) 1 *Barnardiston's Reports*, 305.

found

1820.

The KING *against* BURDETT.

found guilty of the printing wherewith he was charged. It was answered, that, in misdemeanors, an accessory in part is a principal in the whole; and, therefore, as the defendant assisted in the composing, a circumstance essential to the printing, he, by that act, made himself concerned in the whole; that composing was taking a copy in types, which would make the defendant a publisher; since it had often been determined, that the taking of a copy of a libel was an act of publication. But Lord C. J. *Raymond* directed the jury to acquit the defendant of the publication; and, if they believed the evidence, to find him guilty of the printing, which they did accordingly; afterwards, he was sentenced to stand in the pillory twice, and to be kept to hard labour for the space of six months. Serjeant *Hawkins* was counsel for the defendant; and if any doubt had been entertained, as to the propriety of the judgment, the question was upon the record, and the defendant might have had a writ of error. This is an authority, therefore, to shew, that the person who merely puts the type together, for the purpose of printing, is guilty of an offence. It was assumed, in all these cases, that the author of a libel was guilty of an offence; and the point decided was, that the transcriber was also guilty of an offence. Admitting, therefore, that the defendant did not publish the libel in the county of *Leicester*, still he is guilty of the writing and composing it there, with the intent charged in the indictment; and the several authorities cited are sufficient to shew, that that is an offence by the laws of *England*. The form of the precedents of indictments for libels affords a strong argument in support of the doctrine,

1820.

The King *against* Burdett.

trine, that the writing of a libel is per se an offence for the usual form is, that the defendant composed, wrote, and published. Now it is admitted, that the publishing a libel is an offence; and if so, if writing and composing be innocent, there can be no reason for introducing those terms into every information and indictment. And if the writing of a libel be a distinct offence, then, in order to convict the defendant of that offence, the venue must necessarily be laid in the county where the libel was written. The Seven Bishops' Case is a strong authority upon that point. There the writing was in *Surrey*, and it was therefore held, that the defendants could not be found guilty of that part of the offence in the county of *Middlesex*; but the counsel and the Judges seemed to be clearly of opinion, that if the writing had been in *Middlesex*, that would have satisfied the charge against the defendants. The writing was in *Surrey*, and the evidence was that some of the bishops had, in *Middlesex*, acknowleged it to be their writing. And Mr. Justice *Powell* says to the attorney-general (*a*), "What say you to the first part? you have not proved that it was written in *Middlesex*." That was the objection: he says, you have failed to prove that, and on the contrary the evidence shews it was written in *Surrey*. No man can contend, that because it is shewn that a defendant wrote in the county of *A.*, and acknowleged it, in the county of *B.*, to be his hand-writing, it is proved that it was written in the county of *A.* And, in answer to an argument of the attorney-general (*b*), Mr. Justice *Powell* says, "Do you think, Mr. Attorney, that writing

(*a*) 12 *Howell's State Trials*, 331. (*b*) *Ibid.*

1820.

The King *against* Burdett.

in one county is such a continued act, that he may be said to write it in another county?" and the result of Mr. Justice *Powell*'s observations is this: The evidence shewed that the petition was written in the county of *Surrey*. In that county, therefore, the writing was completed; and as the prosecutor did not shew any publication in the county of *Middlesex*, where the venue was laid, he failed in proving any part of the offence charged in that county. And afterwards, in answer to an argument of the recorder, that, supposing a party who had written a scandalous letter to a person at *Exeter*, were to acknowlege, at *Exeter*, the letter to be his hand-writing, that would be evidence of a publication; Mr. Justice *Powell* says, "But is that any evidence where it was written; or, if it be not proved that it was received at *Exeter*, would that be a proof of a publication at *Exeter*?" that is, owning the hand-writing in *Middlesex*, is no proof either of the paper having been written, or of its having been published by the party in that county. The case of the Seven Bishops is therefore an authority to shew, not that publication is necessary to constitute the offence of libelling, but that if the indictment charge the writing in the county of *A.*, the offence, *i. e.* the writing, must be proved to have been done there. The case of the *King* v. *Tutchin* (*a*) is in confirmation of the doctrine, that writing a libel is, per se, an offence, for there the defendant was found guilty of the composing and publishing, but acquitted of the writing in *London*. This rule of law is not confined to the offence of libelling, but applies to the offence of forgery, which bears the strongest analogy to that of libelling; forgery is the

(*a*) 14 *Howell's State Trials*, 1129.

false

1820.

The King *against* Burdett.

false making of a written instrument with intent to defraud. The intent to defraud is usually shewn by proving a publication or uttering of the instrument: it may, however, be proved by other evidence, and when it is so proved, the forgery of an instrument is a sufficient completion of the offence before publication. In *Elliott*'s case, 2 *East, P. C.* 951., the fact of the forgery was brought home to the prisoner, although the note was never published, it having been found in his possession at the time when he was seized. No objection was taken to the conviction on that ground, there being circumstances sufficient to warrant the jury in finding a fraudulent intention. The case afterwards came before the twelve Judges on other points, and the conviction was held good. The opinion of *Le Blanc* J, in *Rex* v. *Crocker* (*a*) is an authority to the same effect. These were indeed cases of forgery by statute; the same principle, however, applies to the case of forgery at common law. In *Rex* v. *Ward* (*b*), it was expressly decided, that at common law, forgery was an offence, although the thing forged be never published. Now the offence of forgery and of libelling bear the strongest analogy to each other. Forgery consists in the false making of a written instrument with intent to defraud. The offence of libelling consists in the making or publishing of a writing with intent to defame. The uttering a forged instrument with intent to defraud is analogous to the offence of publishing a libel with intent to defame. To apply, then, the same reasoning to offences which bear so strong an analogy to each other: The publication of a libel is one medium of proof by which it may be shewn

7 (*a*) *New Rep.* 87. (*b*) 1 *Ld. Raym.* 1469.

that

1820.

The KING *against* BURDETT.

that the author wrote it with an intent to defame; but that intent may be shewn by other evidence, and it is so done in this instance; for it is in proof that the defendant wrote the letter in *Leicestershire*, and sent written directions to *Bickersteth* to forward it to *Brookes* for publication, and that *Brookes* afterwards published it in *Middlesex*. That is evidence, therefore, that the defendant wrote the libel with the intent that the contents should be communicated to the public, and thereby that hatred and contempt of the king's government should be excited. It has been argued, that inasmuch as before the publication of a libel no civil injury is sustained, that therefore no public offence is committed. That argument will apply equally to the case of forgery at common law; for until the publication of the forged instrument no damage could be sustained, and consequently no civil action could be sustained by the party whose name was forged. The argument was urged in the case of *Rex* v. *Ward*, but the Court said, that forgery is punishable, though the party be not actually prejudiced, if he might be prejudiced by it; and therefore they held the conviction good, and that there was no necessity to prove that the writing was published. In the case of conspiracy, too, it is not necessary, that any actual injury should be done. The act of conspiracy is itself an indictable offence. In *Bro. Abr.* tit. *Treason*, Pl. 27., it is laid down, that the fraudulent making of a coin is an offence although it be never uttered. It is clear, that a party may be indicted for writing to another a slanderous letter, and, as far as nisi prius decisions go, the indictment must be in the county where the letter is put into the post, *Rex* v. *Watson* (a), and *Rex*

(a) 1 *Campb.* 215.

1820.

The King against Burdett.

v. *Williams.* (a) In that county, however, the contents of the letter are not communicated to the minds of others, and these cases are authorities to shew that the writing of a libel is an offence distinct from that of publishing. The fallacy of the argument on the other side consists in considering the publication of the libel as the only offence; whereas it constitutes one species of the offence of libelling, and also affords evidence of the intent with which a libel is written.

Admitting, for the sake of the argument, that it was necessary so prove a publication to support the charge in this information, still the venue was properly laid in *Leicestershire*; for the offence charged consists of several parts, the composing, the writing, and the publishing. And in the case of a misdemeanor, where an offence is composed of facts taking place in two counties, the venue may be laid in either. Here it is in evidence, that the defendant composed and wrote the libel in *Leicestershire*, and that he caused it to be published in *Middlesex*. It is true that in felony the rule is different. But Lord *Hale* takes the distinction between a felony and a misdemeanor. (b) "If the offence were partly in *Middlesex*, where the Court sits, and partly in *London*, or any other foreign country, the felony is dispunishable; and so it remains at this day, notwithstanding the statute of 2 & 3 *E.* 6. *c.* 24. 6. But yet in this case the offender committing part of the offence in *Middlesex*, may be indicted of misprision of felony in *Middlesex*, or committing part of the offence in *London*, may be indicted of misprision of felony in *London*, and thereupon fined and imprisoned: and ac-

(a) 2 *Campb.* 506. (b) *Hale's P. C.* 652.

cord-

cordingly it was done by the advice of all the Judges, and the parties fined; for every felony includes misprision." Lord *Hale*, therefore, lays it down, that although the felony be part in one county and part in another, and is therefore dispunishable as such, yet that as to the misprision of the felony, the venue may be laid in either county. He goes on and says, "And yet observe, the felony was one entire felony, committed in two counties, and therefore neither inquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another, and yet the misprision of that felony was inquirable and punishable in either county where but part of the felony was committed; and yet the jury in that case must take notice of the entire felony, part whereof was committed in another county." To apply this doctrine to the present case, in which the charge is, that the defendant wrote, composed, and published: admitting it to be necessary to prove the writing, the composing, and the publishing, it is sufficient to shew that any part of the offence was committed in the county of *Leicester*; and here it is proved that the libel was written in the county of *Leicester*, although it was published in the county of *Middlesex*. In *Hawkins' Pl. C. Book* 2. *s.* 37. it is said, "And it seems by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either county." Now the fact itself is not the offence, but the fact coupled with the injurious consequence. A windmill erected in *A.* may not be a nuisance in *A.*, but may be injurious to the public in *B.*; the windmill may be in the county of *A.*, and the highway to which it is a nuisance may be in the county of *B.*, and it is then

1820.

The King *against* Burdett.

indictable in either county. And *Hobson's* case (*a*), *Esser's* case (*b*), and the opinion of *Ashurst* J. in *Scott* qui tam v. *Brest* (*c*), *Rex* v. *Brisac* (*c*), and *Rex* v. *Bowes* (*c*), are all authorities to the same effect.

Thirdly, There was sufficient evidence of a publication in the county of *Leicester*. The facts proved were, that the defendant wrote the letter in *Leicestershire*; that he was seen there on the day it bore date, and on the following day, and that it came through the hands of *Bickersteth* in an envelope, containing directions to him to transmit it to *Brookes* for publication. The letter, therefore, must either have been delivered open to *Bickersteth* in the county of *Leicester*, or it must have been transmitted by the post or by some private hand. Now the moment the defendant put the libel out of his possession his offence was complete. And it is clear from the nisi prius cases of *Rex* v. *Watson* (*d*) and *Rex* v. *Willaims* (*e*), that Lord *Ellenborough* was of opinion, that the putting of a libellous letter into the post-office in one county with an intent that it should be delivered to a person in another county was a sufficient publication in the first. In the case of *Metcalf* v. *Markham* (*f*), the letter was transmitted by post from *Hull* to a person in *Germany*. The venue was changed upon an affidavit that the cause of action arose wholly in *Yorkshire*, and not elsewhere within the kingdom. A rule was obtained to bring back the venue, upon an affidavit that the letter was dated at *Hull*, and sent by post; and it was

(*a*) *East's Pl. C.* Addenda xxiv.
(*b*) 2 *East P. C.* 1125.
(*c*) 2 *Term Rep.* 238.
(*c*) 4 *East*, 164.
(*c*) *Ib.* 171.
(*d*) 1 *Campb.* 215.
(*e*) 2 *Campb.* 506.
(*f*) 3 *T. R.* 652.

argued,

1820.

The KING *against* BURDETT.

argued, that as it had passed through other counties, it might have been said to have been equally published in each of those counties. The Court, however, were of opinion, that the fact of the letter having been put into the post-office in the county of *York* was sufficient to support that part of the affidavit that the cause of action arose in the county of *York*, and not elsewhere in the kingdom. These authorities are sufficient to shew that the putting a letter into the post is a sufficient evidence of a publication. The same observation applies to sending a letter by a private hand; for the effect of the decisions is, that the delivery of a libel from one person to another is a publication in point of law.

[The arguments on the part of the defendants were not concluded in this term.]

ALDISS *against* BURGESS.

Practice. Bail.

A RULE having been obtained, calling upon the defendant, to shew cause why he or his attorney should not pay the costs incurred by the plaintiff, in consequence of six different notices of the same bail having being given. It appeared, upon the affidavits, that the bail having attended, under two of the notices, before a Judge at chambers, one justified, and the other was rejected on some formal objection. Four other notices were afterwards given, but the bail did not attend. The defendant's attorney swore, that, from the instructions he

 had

1820.

ALDISS *against* BURGESS.

had received from his client, he believed the bail would have attended on the days mentioned in the notice.

Comyn shewed cause. By the practice of the Court, the plaintiff would not be entitled to any costs, if the bail had justified, because there was no change of the bail. The plaintiff ought not, therefore, to be placed in a better situation, in consequence of the bail not having justified.

ABBOTT C. J. The giving of these frequent notices of bail has become a matter of so much vexation, that it is fit to put a stop to the practice. In this case the attorney has sworn, that he believed, from his instructions, that the bail would have attended on the days mentioned in the notices. We think, therefore, in this case, that the attorney is excused. Whenever a proper case occurs, we will visit the defendant's attorney with costs; for it is his duty to take care that the bail will attend pursuant to notice. In the present case the rule must be made absolute against the defendant alone.

Rule absolute.

END OF TRINITY TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

 of

of physicians; and it appearing that the defendant never had, or could have done so, prior to *August* 1. 1815, that such total incapacity was cogent evidence to be left to the jury, and that they did right to find that he had never practised *as an apothecary*, although, in fact, he had on many occasions administered medicines to various patients prior to that period. *Apothecaries' Company* v. *Warburton*, *M.* 60 *G.* 3. Page 40

APPEAL.

By 49 *G.* 3. *c.* 68. *s.* 5. ten clear days' notice of the intention to appeal is required: Held, that the ten days are to be taken exclusively both of the day of serving the notice and the day of holding the sessions. *Rex* v. *Justices of Herefordshire*, *E.* 1 *G.* 4. 581

APPRENTICE.

1. Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and that he then avoided the indenture: Held, that this was no answer to the action. *Cuming* v. *Hill*, *M.* 60 *G.* 3. 59
2. A father has, at the common law, no authority to bind his infant son apprentice without his assent; and consequently, where an indenture of apprenticeship was executed by the master and the father of the apprentice, but not also by the apprentice himself: Held, that it was invalid, and that no settlement could be gained under it. *Rex* v. *Inhabitants of Arnesley*, *E.* 1 *G.* 4. 584

ASSUMPSIT.

1. Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him. *Cannan* v. *Bryce*, *M.* 60 *G.* 3. Page 179
2. Where *A.* under a contract to deliver spring wheat had delivered to *B.* winter wheat, and *B.* having again sold the same as spring wheat, had in consequence been compelled, after a suit in *Scotland* which lasted many years, to pay damages to the vendee; and afterwards *B.* brought an action of assumpsit against *A.* for his breach of contract, alleging as special damage the damages so recovered: Held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract, which in assumpsit was the gist of the action, having occurred and become known to *B.* more than six years before that period, *A.* might properly plead actio non accrevit infra sex annos. *Battley* v. *Faulkner*, *H.* 60 *G.* 3. and 1 *G.* 4. 288
3. Where a bill of exchange payable at the house of *A.* had been there presented for payment, and dishonoured, and the acceptor afterwards remitted to *A.* a sum of money for the purpose of enabling him to pay the dishonoured bill, and also another of less value. And *A.* in answer stated the fact of the bill having been dishonoured, but added, that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill: Held, that the holder of the original bill could not maintain an action against *A.*, there being no privity between them. *Yates and Others* v. *Bell and Others*, *T.* 1 *G.* 4. 643

4. Cp-

4. Certain policies of insurance belonging to *A.* had been deposited by him as a security for a debt of 800*l.* at a banker's. *B.*, who was acquainted with these circumstances, afterwards, at the desire of *A.*, expressly undertook to take the policies and settle with *H. W.*, and to pay in the amount which he might receive at the banker's to *A.*'s account there. Upon this undertaking the policies were given to him, and upon them he received the sum of 949*l.* *A.* having become bankrupt, and being then indebted to *B.* in a larger sum, the latter refused to pay over the money so received: Held, that the assignee of *A.* could not (even with the assent of the banker) maintain any action against *B.* for the breach of his undertaking. *Chalmers* v. *Page*, *T.* 1 *G.* 4. Page 697

ATTORNEY,

See Principal and Agent, 1. Practice, 5.

1. In the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted; but has no right to be present, nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case. *Rex* v. *Borron*, *H.* 60 *G.* 3. and 1 *G.* 4. 432
2. A charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill, within 2 *G.* 2. *c.* 23. *s.* 23. as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued. *Burton* v. *Chatterton*, *E.* 1 *G.* 4. 486

AWARD.

The Court will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; and, therefore, where the captain had sold, at an intermediate port, part of the cargo, at a price higher than it would have fetched at the port of destination, and, upon a reference to settle the average loss between the shipowner and charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods, when sold, and not for the price they would have fetched at the port of destination, the Court refused to set aside the award. *Richardson* v. *Nourse*, *M.* 60 *G.* 3. Page 237

BANKRUPTCY.

1. By the 49 *G.* 3. *c.* 121. *s.* 8., the certificate of a bankrupt is a bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment, by the bankrupt, of the original debt when due; and, therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar. *Van Sandau* v. *Corsbie*, *M.* 60 *G.* 3. 13
2. Upon a motion for a prohibition to the Lord Chancellor, sitting in bankruptcy, it appeared, that the assignees had seized, as the property of the bankrupt, a farm, belonging

longing to *A. B.*, and had kept it a long time and mismanaged it; and that the Lord Chancellor had referred it to the Master, to take the account between *A. B.* and the assignees, in respect of such property and of its mismanagement; and afterwards, upon his report, had ordered a certain sum to be paid to *A. B.* by the assignees, the commission having been previously superseded: Held, first, that the jurisdiction of the Lord Chancellor, sitting in bankruptcy, was not confined to the period during which the commission subsisted.

Secondly, that he had not exceeded his jurisdiction, in ordering the Master to take an account, as to the mismanagement &c. of the property, nor in making the assignees personally liable, beyond the funds in their hands, for such mismanagement:

Thirdly, that the Lord Chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of the bankrupt, and over the assignees, for all acts done by them in their character of assignees, by virtue or under colour of the commission:

Fourthly, that, in cases where the Lord Chancellor has jurisdiction generally, this Court has no authority to revise his order:

Fifthly, that no prohibition can be granted, after the final order of the Lord Chancellor, unless there be an original want of jurisdiction apparent on the face of the proceedings.

Quære, whether this Court have authority to direct a prohibition to the Lord Chancellor, sitting in bankruptcy. *Ex parte Cowan*, *M.* 60 *G.* 3. Page 123

3. Where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate, and being so in possession, became a bankrupt; and a creditor of the intestate, afterwards took out letters of administration, and claimed the goods from the assignees: Held, that these goods were within 21 *Jac. c.* 19., being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them. *Fox, Administrator*, v. *Fisher*, *M.* 60 *G.* 3. Page 135

4. A surety under an annuity-deed is not entitled, under 49 *G.* 3. *c.* 121. *s.* 8., to prove the value of the annuity as a *debt* under the commission; and therefore, where such a surety had redeemed the annuity, subsequently to the bankruptcy, it was held, that he was entitled to maintain an action for the value against the bankrupt, who had obtained his certificate, and that, although the grantee had proved under the 17th section. *Flanagan* v. *Watkins*, *M.* 60 *G.* 3. 186

5. Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture, &c., in his possession, and afterwards, notwithstanding such agreement, seized the same; it was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees. *Nias* v. *Adamson*, *M.* 60 *G.* 3. 225

6. One of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants,

BASTARD,

See Justices, 3.

BILL OF EXCHANGE,

See Lien, 2.

CANAL.

Where, by a canal act, a toll of 1*s.* per ton was imposed upon all coal, &c. navigated upon any part of the canal from a place *A.*, or from any place within two miles thereof: Held, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from *A.*, although conveyed upon a part of the canal within two miles of *A. Brittain* v. *The Cromford Canal Company*, *M.* 60 *G.* 3. Page 139

CHARITABLE USE,

See Copyhold, 1.

CLERK OF THE PEACE,

See Sessions.

COMMON,

See Copyhold, 2.

CONSIGNOR AND CONSIGNEE.

By a bill of lading, the captain was to deliver the goods for the consignor, and, in his name, to the consignee. At the time of shipment, the consignee had no property in the goods: Held, that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and that, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship. *Sargent* v. *Morris*, *H.* 60 *G.* 3. and 1 *G.* 4. 277

CONSTABLE.

A constable acting under a warrant commanding him to take the goods of *A.*, takes the goods of *B.*, believing them to belong to *A.*: Held, that he was entitled to the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 8., and that an action against him must be brought within six calendar months. *Parton* v. *Williams*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 330

CONVICTION.

1. A conviction stated, that plaintiff having been brought before a magistrate on an information charging him with having unlawfully returned without a certificate to a parish from which he had been removed, and that upon that occasion he confessed himself guilty: Held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to shew in his defence that he did not return in a state of pauperism. *Mann* v. *Davers*, clerk, *M.* 60 *G.* 3. 103
2. The 21 *Jac.* 1. *c.* 7. provides, that an alehouse-keeper suffering *inhabitants* of the parish to tipple, may be convicted on the oath of one witness; and the 1 *Car.* *c.* 4. extends the same penalty to the case of *strangers*, but requires proof by two witnesses: Held, therefore, that a conviction stated to be on the oath of one witness against an alehouse-keeper, for permitting persons to tipple in his alehouse, was bad, for not stating whether those persons were inhabitants or strangers. *Rex* v. *Dove*, *E.* 1 *G.* 4. 596

COPYHOLD.

1. A conveyance of copyhold lands to charitable uses, in the life-time of the party, is within 9 *G.* 2. *c.* 36., and therefore must be made with the formalities required by that

act.

act. The Court will not, even after a long and undisturbed enjoyment, presume a bargain, and sale, and enrolment of the same in Chancery:

Quære, if it would be sufficient, in the case of copyhold, to declare the uses by a deed, conformably to 9 *G.* 2. *c.* 36., and to cause such deed to be enrolled in Chancery. *Doe dem. Howson* v. *Waterton, M.* 60 *G.* 3. Page 149

2. A copyhold tenement, to which a right of common was annexed, having vested in the lord by forfeiture, he re-granted it as a copyhold, with the appurtenances: Held, that having always continued demisable, while in the hands of the lord, it was a customary tenement, and, as such, was still entitled to right of common: Held, secondly, that a custom for the lord to grant leases of the waste of the manor, without restriction, is bad in point of law. *Badger* v. *Ford, M. T.* 60 *G.* 3. Page 153

3. A copyhold of inheritance is not forfeited by a conviction of felony without attainder, unless there be a special custom in the manor. *Rex* v. *Willes,* knt., *E.* 1 *G.* 4. 510

CORONER.

A coroner's duty is judicial, and he can only take an inquest super visum corporis; and an inquest in which the jury were not sworn by the coroner himself, and super visum corporis is absolutely void. The Court will not, therefore, after an adjournment by the coroner of such an inquest, grant any mandamus to compel him to proceed in it. *Rex* v. *Ferrand, M.* 60 *G.* 3. 260

CORPORATION.

1. A corporation not established for trading purposes, cannot be acceptors of a bill of exchange payable at a less period than six months from the date; because such a case falls within the provision of the several acts passed for the protection of the bank of *England,* by which it is enacted, that it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof: Quære, whether any, except a trading corporation, can bind themselves as parties to a bill of exchange. *Broughton* v. *The Proprietors of the Manchester and Salford Water Works, M.* 60 *G.* 3. Page 1

2. A justification in trespass stated, that by custom, a court had, from time immemorial, been holden before the steward and port-reeve of a borough, or their sufficient deputy or deputies, and that a court was holden before *C. D.*, the deputy of *A. B.*, who was then steward and port-reeve: Held, that upon this plea the two offices must be taken to have been compatible, and that the appointment of the deputy by the person holding both offices was sufficient. *Green* v. *Davies and Another, M.* 60 *G.* 3. 60

3. A plea to a quo warranto stated that an immemorial court-leet was in part holden in the morning and in part in the evening, and that the custom had been to elect the mayor at the morning court, which burgess had been accustomed to be sworn into office at the evening court by the steward or his deputy. The replication denied the mode of election; and there was also an issue, "not duly sworn." At the trial it appeared, that, in addition to the custom set out in the plea, it had

had been usual for the leet jury to present, in writing, the candidate who had most votes at the morning court, to be sworn in by the steward at the evening court; but they had no control over the poll: Held, that this was a mere ministerial act, on their part, and that it was no essential part of the custom, and need not be stated on the record. *Rex* v. *Rowland*, *M.* 60 *G.* 3. Page 130

4. By the charter of a borough it was directed, that when it should happen that any of the capital burgesses should die, or dwell out of the borough, or for some cause be removed, it should be lawful for the remainder to elect others in the place of those so happening to die or be removed: Held, that these words were not so unambiguous as to warrant the court in granting a mandamus to admit two persons in the room of two non-resident capital burgesses, the corporation not having previously removed them for this cause from their offices. *Rex* v. *Mayor of Truro*, *E.* 1 *G.* 4. 590

5. On the charter days for the election of lord mayor of the city of *London*, the business of the election ought to have the precedence of all other matters; and therefore it is not lawful, after the lord mayor and aldermen have retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether. *Rex* v. *Parkyns and Others*, *T.* 1 *G.* 4. 668

COSTS.

1. Plaintiffs sued, as executors, for the balance of an account due to the testator; and, it appearing at the trial that the balance claimed arose out of matters of account between the plaintiffs in their own right, as surviving partners of the testator, they were nonsuited: Held, that the Court had no power to order the defendant to have his costs allowed him as costs in the cause. *Barnard and Another, Executors*, v. *Higdon*, *M.* 60 *G.* 3. 213

2. To trespass quare clausum fregit, defendant pleaded not guilty, and a justification of a right of way; plaintiff, in replication, admitted the right of way, and new assigned extra viam. The plaintiff having obtained a verdict on the new assignment, with 1*s.* damages, was held entitled to full costs. *Taylor* v. *Nicholls*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 443

COUNTY RATE.

A district, situate within the local limits of the county of *York*, from time immemorial had been part of the county of *Durham*, yet had always contributed to the public burdens of the county of *York*: Held, that it was to be presumed that such district, either in the original division of land into counties, or at some subsequent period (when it was separated from the county of *York*), was made part of the county of *Durham*, on condition of its contributing to the burdens of the county of *York*, and that such district was liable to the county-rate of *Yorkshire*. *Johnson* v. *Dealtry and Others*, *M. T.* 60 *G.* 3. 72

COURT,

See Pleading, 2.

COVENANT,

See Apprentice, 1.

1. Where *A.*, being possessed of certain premises for a term of years, assigned part of them over

to *B.* for the residue of his term, with a covenant for quiet enjoyment, and *B.* afterwards assigned them over to *C.*: Held, that *C.*, having been evicted by *J. S.*, the lessor of *A.*, for a breach of covenant committed by *A.* previously to the assignment to *B.*, might maintain an action against *A.* upon the covenant for quiet enjoyment, on the ground that there was a privity of estate between *A.* and *C.*

Secondly, the declaration having set out the indenture from *A.* to *B.*, in which it was recited that *J. S.* by indenture demised to *A.* the premises; and it afterwards appearing on the face of the declaration, that *J. S.* had entered and ejected *C.* from the premises for a forfeiture: Held, that the Court might, particularly after a verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact.

Thirdly, when part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, it is to be presumed, after verdict, that the jury were directed at the trial not to take that part into their consideration. *Campbell* v. *Lewis*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 392

2. Where *A.*, being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate and effects whatsoever and wheresoever, to and amongst the children both of his first and second marriage, share and share alike: Held, that this covenant was applicable only to such real and personal estate of which *A.* might die seised or possessed, and that it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement. *Needham* v. *Kirkman*, *E.* 1 *G.* 4. 531

Where a party took seven-sixteenths of certain premises, the whole of which then were rated at the annual value of 35*l.*, and the lessor covenanted to pay all taxes then chargeable on the premises, or any part thereof, or on the yearly rent thereby reserved, and the lessee covenanted to pay all *fresh* taxes which should thereafter be charged upon the premises, or any part thereof: Held, by *Bayley* and *Holroyd* Js., dissentiente *Abbott* C. J., that the true construction of these covenants was, that the lessor should pay such taxes as were chargeable on the premises at the time of making the lease, considering them as of the annual value of seven-sixteenths of 35*l.*, and that the lessee should pay all fresh taxes, and all such additions to the taxes formerly chargeable, as were occasioned by the improved value of the premises. *Watson* v. *Atkins*, *T.* 1 *G.* 4. Page 647

CRIMINAL INFORMATION,

See Practice, 20.

CROSS REMAINDERS,

See Devise, 1.

DEED,

See Fine.

DEVISE.

See Fine, 1.

1. A testator having three sons, devised as follows: I leave the *Withy Stakes* farm, with the appurtenants, to my two youngest sons, *John* and

and *George*, equally between them, share and share alike; and I entail the said farm on the male heirs of *John* and *George*, being born in wedlock. There being no devise over, it was held, that cross-remainders could not be raised by implication, and that on the death of *George* without issue, his moiety went to the heir at law. *Cooper* v. *Jones*, *H.* 60 *G.* 3. and 1 *G.* 4. 425

2. Where a testator, having devised copyhold lands to *A.* for life, with different remainders over, and having surrendered them to the uses of his will, afterwards, in contemplation of marriage, conveyed his estates to trustees and their heirs, to secure a jointure for his intended wife, and subject to a term of 99 years for that purpose, to the use of himself in fee, and subsequently surrendered his copyhold lands to these uses: Held, that this did not amount to a total revocation of his will, but that the devisee took the copyhold land, subject to the charge created by the settlement. *Vawser and Others* v. *Jeffery and Others*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 462

3. A testator, by his will, devised all his real estates in several parishes to trustees, their heirs and assigns for ever, upon trust to sell his estate at *H.* to pay his debts; and in case it should not be sufficient, then, as to his estate at *F.* upon trust, to sell that also, to make good the deficiency; but, in case it should not be necessary, then, as to his estate at *F.* and his other remaining estates in trust, to receive the rents and profits till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at *F.*, if it should be sold, to his daughter, upon coming of age, and from that period to the use of the trustees for the life of his daughter, and after her death to the use of her children; and by a codicil to his will, in which he made an alteration as to the trustees, the testator devised his estates to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid, in trust as aforesaid." It appeared that the estate at *H.*, when sold, was alone sufficient to pay the debts: Held, that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at *F.* and elsewhere. *Hawker and Another* v. *Hawker and Others*, *E.* 1 *G.* 4. Page 537

4. A testator having a son and daughter, and the latter having several children, devised to his son *W. F.* in fee; and if he should have no children, child, or issue, the said estate was, on the decease of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* might leave to the younger branches of the family: Held, that *W. F.* took, under this will, an estate in fee, with an executory devise over to the person who, on the happening of the event contemplated by the will, should become the heir at law of the testator. *Doe dem. King and Ux.* v. *Frost*, *E.* 1 *G.* 4. 546

5. Devise to *H. D.* for life, with remainder to the first son of *C. D.* in tail male, and in default of issue to his second son in tail male, and in default of his issue to the third, fourth, fifth, and sixth sons, in tail male, severally and successively,

sively, in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth: the several and respective heirs male of all and every son, every elder of such sons and his heirs male being preferred to and to take before the younger; and in default of such issue, then to the first, second, third, fourth and all, &c. the daughters of *C. D.* and their issue, severally, successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to, and to take before the younger; and in default of any such issue, then to *G. H*, the eldest son of *T. H.*, of *Nottingham,* for life, with limitation to his first and other sons and daughters similar to those to the children of *C. D.;* and in default of such issue, to *S. H.*, second son of *T. H.*, of *Nottingham,* for life, with precisely the same limitations to his first and other sons and daughters as in the preceding; and in default of such issue, to *J. H.*, the third son of *T. H.*, of *Nottingham,* for life; with remainder to his children, as in the preceding limitations. *S. H.* was in fact the *third* and *J. H.* the *second* son of *T. H.* of *Nottingham:* Held, that evidence of the state of the testator's family, and other circumstances, was admissible to shew whether he had mistaken the name of the devisee or not; and, upon such evidence being given, that it became a question of fact for the jury, whether the mistake was in the name or in the description. *Doe, dem. Le Chevalier,* v. *Huthwaite, T.* 1 *G.* 4. Page 632

6. A testator having an estate which had been conveyed by the settlement on his first marriage, to trustees to the use of himself for life, remainder to his first and other sons, successively, in tail male; and having one son and two daughters by his first marriage, shortly after his second marriage made his will, and devised to his son all his manors, &c. and personal property subject to the payment of his debts and legacies; but in case his son should depart this life without issue male, or in case of failure of issue male of the testator's body, he bequeathed to all and every his daughters who should be living at the time of his death, or born in due time afterwards, 40,000*l.* equally to be divided amongst them, in addition to what they might be entitled to under the marriage settlements of their respective mothers; and if only one daughter, he bequeathed 20,000*l.* to her; he then charged his estates with the payment of these sums, and devised them to *A.* and *B.*, their heirs, &c. without impeachment of waste, upon trust, by sale or mortgage to raise a sufficient sum to pay those legacies with interest; and he then devised the remainder of his lands, manors, &c. as should not be sold by the trustees for that purpose, for want, or in failure of issue male of his body, as aforesaid, unto his brother for life, with different remainders over. The testator had no children by the second marriage, and his only son by the first marriage, having died under age, unmarried, and without issue: Held, that the surviving daughters took no estate, by descent, in the hereditaments devised by the will; and, secondly, that if the devise to *A.* and *B.* had been of a power to raise money by sale, and not of a legal estate, that the testator's brother would have taken an estate for life with remainders over; and thirdly, that under

under the will *A.* and *B.* took an estate in fee. *Sandford and Others* v. *Irby and Others*, *T.* 1 *G.* 4. Page 654

DISCLAIMER.

A devisee in fee may by deed without matter of record disclaim the estate devised. *Townson* v. *Tickell and Another*, *M.* 60 *G.* 3. 31

EJECTMENT.

1. The Court will not stay the proceedings in an ejectment until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid. *Doe, Dem. Williams*, v. *Winch and Others*, *E.* 1 *G.* 4. 602
2. To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent it is sufficient, if his authority be subsequently recognised; and therefore, where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others: Held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. *Goodtitle, Dem. King*, v. *Woodward*, *T.* 1 *G.* 4. 689

ESCAPE.

The sheriff having, within a liberty where particular officers had the exclusive privilege of executing all process, arrested a defendant upon a ca. sa. in which there was not any non-omittas clause, suffered him to go at large before his removal from the liberty: Held, that he was liable in an action for an escape. *Piggott* v. *Wilkes*, *E.* 1 *G.* 4. Page 502

EVIDENCE.

1. Two divisions within a parish had separate overseers and separate rates, and managed their poor separately; but at the end of every year, in making up their accounts, the overseers of the one (if they had any money in hand) paid the balance over to the overseers of the other: Held, that this was in effect one joint parochial account; and that all the overseers were to be considered as joint overseers of the parish at large: held, also, that where a payment has been made by a party at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them till after they are out of office, it is a question proper for the jury, to say whether, under these special circumstances, the party ought not to be considered as having relied upon the sole responsibility of the overseer at whose request the payment was made. *Malkin* v. *Vickerstaff*, *M.* 60 *G.* 3. 89
2. The examination of a soldier, taken under the mutiny act, is to be received as evidence as to his settlement, even though he be dead, or absent from the kingdom, at the time when the appeal is tried. *M.* 60 *G.* 3. 121
3. An entry in the public books of a corporation is not evidence for them, unless it be an entry of a public nature. *Marriage* v. *Lawrence*, *M.* 60 *G.* 3. 142
4. Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not

admis-

admissible to shew, that at the time of making it, it was agreed that it should not be payable till after the decease of the maker. *Woodbridge* v. *Spooner and Wife, Executrix, M.* 60 *G.* 3. Page 233

5. Where a loss had been settled upon a policy of insurance against fire in the year 1813, and upon a trial in the year 1819, the plaintiff, in an action for libel charging him with having made fraudulent claims upon the insurance company, with repect so such loss, called their agent, who stated, that the policy was returned to him after the fire, and that he had it in possession then, and afterwards, when the plaintiff made a larger insurance with the company; that upon the loss having been settled the old policy became an useless paper, that he did not know what had become of it, but he believed he had returned it to the plaintiff. The clerk to the plaintiff's attorney then proved, that within a few days of the trial, he went to the plaintiff's house to search for the policy, when the plaintiff shewed every drawer where he usually kept his papers: that he examined such drawers, and every other place where he thought it likely to find such a paper, without finding it: Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy. *Brewster* v. *Sewell, H.* 60 *G.* 3. and 1 *G.* 4. 296

6. Where, upon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over, and assented to by him, and it was then agreed that he should on a future day bring a surety and sign the agreement, neither of which he ever did: Held, that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms of the letting, therefore, might be proved by parol evidence. *Doe, dem. Bingham and Others,* v. *Cartwright, H.* 60 *G.* 3. and 1 *G.* 4. Page 326

7. In an action against a gamekeeper for a penalty for using a gun to kill game, without being qualified; evidence of the real title to the manor is admissible for the purpose of negativing the existence of a colourable title in the person under whom the defendant claims to act.

Entries in the books of the clerk of the peace of deputations, formerly granted to gamekeepers by the real owner of the manor, are also evidence to shew that manorial rights were publicly exercised by him, and that the person whose title was set up by the defendant, knew that he had not any title whatever. *Hunt* v. *Andrews, H.* 60 *G.* 3. and 1 *G.* 4. 341

8. Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, and the master having consented to it, and all having agreed to part, the apprentice went away; but the indenture, which was in the hands of a third person, was never applied for, or given up: Held, that the apprenticeship was not put an end to by this agreement, although the master said, that he would have given up the indenture if he had had it in his possession at the time, and afterwards refused to take back the apprentice. Secondly, where an unstamped indenture recited, that a premium of 12*l.* had been paid; but added, that it was paid out of a charitable donation fund belonging to the parish, and the master being called, proved that the premium had been paid by the parish officers, who told him

at the time of paying it, that it was charity money: Held, that the fact of payment being proved, the recital in the indenture, and the declaration of the parish officers, were not admissible in evidence, so as to bring the case within the exception in the 44 *G.* 3. *c.* 98. *s.* 190., and that the indenture, being unstamped, was void. Semble, that a charitable donation fund, belonging to a parish, is a public charity within such exception. *Rex* v. *Inhabitants of Skeffington, H.* 60 *G.* 3. and 1 *G.* 4. Page 382

9. Upon an indictment against *A. B.* and others for unlawfully meeting together, with persons unknown, for the purpose of exciting discontent and disaffection, it was held, (*A. B.* having presided at this meeting,) that resolutions, passed at a former meeting assembled a short time before in a distant place, and at which *A. B.* also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence, to shew the intention of *A. B.* in assembling and attending the meeting in question.

Secondly, a copy of these resolutions, delivered by *A. B.* to the witness at the time of the former meeting as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, is admissible without producing the original.

Thirdly, large bodies of men having come to this meeting from a distance, marching in regular order, resembling a military march, it was held to be admissible evidence, to shew the character and intention of the meeting, that within two days of the same, considerable numbers were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting; and that on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again:

Held, also, that it was admissible to shew in evidence, for the same purpose, that another body of men, in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing.

Parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible without producing the originals.

Upon such an indictment, evidence of the supposed misconduct of those who dispersed the meeting, is not admissible. *Rex* v. *Hunt and Others, E.* 1 *G.* 4. Page 566

10. An agreement in writing, unstamped, for the letting a tenement at a certain rent, having been lost: Held, that parol evidence of its contents was not admissible, for the sake of proving thereby the value of the tenement. *Rex* v. *Castle Morton, E.* 1 *G.* 4. 588

11. Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of *England*, to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do: The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years: Held, the statute of limitations having been pleaded, that upon this form of declaration the plaintiff was not entitled to recover.

On

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that upon this record such an acknowledgment was not sufficient. *Short* v. *M'Carthy*, *T.* 1 *G.* 4. Page 626

12. Devise to *H. D.* for life, with remainder to the first son of *C. D.* in tail male, and in default of issue, to his second son in tail male, and in default of his issue, to the third, fourth, fifth, and sixth sons, in tail male, severally, and successively, in remainder one after another in order and course as they respectively should be in seniority of age and priority of birth; the several and respective heirs male of all and every son, every elder of such sons and his heirs male, being preferred to and to take before the younger; and in default of such issue, then to the first, second, third, fourth, and all, &c. the daughters of *C. D.* and their issue severally, successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to and to take before the younger; and in default of any such issue, then to *G. H.*, the eldest son of *T. H.* of *Nottingham*, for life, with limitation to his first and other sons and daughters, similar to those to the children of *C. D.*; and in default of such issue, to *J. H.*, the third son of *T. H.* of *Nottingham*, for life, with remainder to his children, as in the preceding limitations. *S. H.* was, in fact, the third, and *J. H.* the second son of *T. H.* of *Nottingham*: Held, that evidence of the state of the testator's family, and other circumstances, was admissible, to shew whether he had mistaken the name of the devisee or not; and, upon such evidence being given, that it became a question of fact for the jury, whether the mistake was in the name or in the description. *Doe, dem. Le Chevalier*, v. *Huthwaite*, *T.* 1 *G.* 4. Page 632

13. Where a builder, having taken ground on a building lease, at the ground-rent of 108*l.*, assigned over his lease to *A.* for a sum considerably exceeding the then value of the premises, and at the same time took a lease from *A.* at an increased rent of 395*l.* and containing the same covenants for building as the original lease, together with a stipulation of being allowed to repurchase the lease at the same sum for which it was assigned by him to *A.*: Held, that, under these circumstances, it was properly left to the jury to say, whether this was a purchase or an usurious loan, and the jury having found it to be the latter, the Court refused to disturb the verdict. *Doe, dem. Grimes and Others, Assignees of Hammond a Bankrupt*, v. *Gooch*, *T.* 1 *G.* 4. 664

EXECUTORS,

See Costs, 1.

One of two executors having alone proved the will, and received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, and afterwards permitted the money to be lent out to a third person, by whom it was paid to *A.*; *A.*, on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor: Held, that both executors might join in an

an action brought to recover the money against *A*.

Held, also, that it does not amount to a devastavit if an executor lends out on private security money belonging to the testator, but not wanted for the immediate uses of the will; provided he exercises a fair and reasonable discretion on the subject. *Webster and Another, Executor and Executrix of Heatley*, v. *Spencer*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 360

FINE.

To avoid a fine, a husband claiming in right of his wife, must enter within five years after his title accrues.

By deed an estate was settled, after several preceding estates tail, to the use of all and every the nearest of kin in equal degree to *D. M.*, at the time of her decease without issue of the name of *Brewer*: Held, that a person who at the time of *D. M.*'s death was her nearest of kin, born with the name of *Brewer*, but who was not her nearest of kin, and who had, previous to *D. M.*'s death, married and assumed her husband's name, was not entitled to take under this clause in the deed. *Doe, dem. Wright*, v. *Plumptre*, *H.* 60 *G.* 3. and 1 *G.* 4. 474

FORFEITURE,

See Copyhold, 3.

FRAUDS, STATUTE OF,

See Will.

1. Where a vendee verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares, (then in vendor's possession, constituting part of a larger quantity in bulk,) to remain in vendor's possession till called for; and the agent, on his return home, measured the twelve bushels, and set them apart for the vendee: Held, that this did not amount to an acceptance by the latter, so as to take the case out of the 17th section of the statute of frauds. *Howe* v. *Palmer*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 321

2. *A.* agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the expiration of that time, *A.* rode the horse, and gave directions as to its treatment, &c., but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away: Held, that there was no acceptance of the horse within the meaning of the statute of frauds. *Tempest* v. *Fitzgerald*, *T.* 1 *G.* 4, 680

FREIGHT,

See Lien, 2.

GAMEKEEPER,

See Evidence, 7.

GUARANTEE.

A guarantee of the payment of *A. B.* to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing or standing guarantee to that extent for goods to be at any time supplied to *A. B.* until the credit is recalled. *Melville and Another*, v. *Hayden*, *E.* 1 *G.* 4. 593

HABEAS CORPUS,

See Practice, 14. 26.

HIGHWAY.

An order for stopping up an unnecessary highway under 55 *G.* 3. *c.* 68. *s.* 2. must be made at a special sessions, and that fact must appear on the face of the order. *Rex* v. *Sheppard, H.* 60 *G.* 3. and 1 *G.* 4. Page 414

INDICTMENT.

Upon an indictment for an assault upon *E. E.*, it is sufficient to prove that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, *E. E.* the elder and *E. E.* the younger. *Rex* v. *Peace, E.* 1 *G.* 4. 579

INNKEEPER,

See Post-horse Duty.

A house of public entertainment in *London*, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in *London. Thompson* v. *Lacy, H.* 60 *G.* 3. and 1 *G.* 4. 283

INSOLVENT DEBTOR.

A plea of discharge under the insolvent debtors' act is no bar to an action of trespass for mesne profits, even though accruing before the discharge. *Lloyd* v. *Peel, H.* 60 *G.* 3. and 1 *G.* 4. 407

INSURANCE.

The captain of a *Spanish* ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured: Held, in an action upon a policy of insurance upon *Spanish* property, subscribed by *British* underwriters, who at the time of effecting the policy knew that the assured were *Spaniards*, and that *Spain* was at war with the state to whom the capturing vessel belonged, that this was a loss by jettison; that term in a policy of insurance signifying any throwing overboard of the cargo for a justifiable cause; secondly, that it was a loss by enemies; and, thirdly, if not by jettison, in the strictest sense, that it was something of the same kind; and, therefore, came within the words "all other losses and misfortunes." *Butler* v. *Wildman, H.* 60 *G.* 3. and 1 *G.* 4. Page 398

JUSTICES.

1. The acts of a jutice of the peace who has not duly qualified, are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. *Margate Pier Company* v. *Hannam, M.* 60 *G.* 3 266
2. Where a criminal information is applied for against a magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive, (amongst which

fear and favour are generally included,) or from mistake or error only. In the latter case, the Court will not grant the rule. Secondly, in the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case. *Rex* v. *Borron, Esq. H.* 60 *G.* 3. and 1 *G.* 4. Page 432

3. A warrant for the commitment of the putative father of a bastard child, until he should pay a sum due for the maintenance of the child and legal accrued fees, or until he should be otherwise delivered by due course of law, is bad, the magistrate not being authorised under 49 *G.* 3. *c.* 68. *s.* 3. to make such a warrant. *Robson* v. *Spearman, E.* 1 *G.* 4. 493

LAND-TAX.

A plea in bar in replevin stated, that divers sums of money amounting to a certain sum, had been, from time to time, duly assessed and rated upon the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which defendant, as landlord, was liable to bear in respect of the rent: Held, that this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued, or was accruing. *Stubbs* v. *Parsons, E.* 1 *G.* 4. 516

LANDLORD AND TENANT,

See PRACTICE, 15.

A tenant whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action upon the case under 2 *W.* & *M. S.* 1. *c.* 5. against the landlord or his bailiffs for selling the same before five days, or a reasonable time have elapsed after the seizure, such sale being wholly void. *Owen* v. *Legh and Another, H.* 60 *G.* 3. and 1 *G.* 4. Page 470

LEASE.

A lease by the warden and poor of an hospital, under the corporation seal, made before the expiration of a former lease, to a lessee, who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital. *Grumbrell* v. *Roper, T.* 1 *G.* 4. 711

LIBEL.

1. The statute 9 & 10 *W.* 3. *c.* 32. has not altered the common law, as to the offence of blasphemy, but only given a cumulative punishment. It is, therefore, still an offence at the common law to publish a blasphemous libel. *Rex* v. *Carlile, M.* 60 *G.* 3. 161
2. It is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature. *Rex* v. *Mary Carlile, M.* 60 *G.* 3. 167
3. Declaration for a libel concerning the plaintiff in his profession as an attorney. The libel began, "shameful conduct of an attorney," and then proceeded to give

an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in the court of law: Held, after verdict for the defendant, that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.

Quære, Whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the enquiry. *Lewis, Gent.* v. *Clement, T.* 1 *G.* 4. Page 702

4. Quære, Whether the mere writing of a libel, with intent to excite hatred and contempt of the king's government, be an indictable offence. Assuming that the offence is not complete until publication, query, whether it can be tried in any county but in that where the publication took place.

Defendant was indicted for publishing a libel in the county of *L.*; the writing was dated from that county, and the defendant was seen there both on the day of the date and the day following; and the letter was received by *A.* from *B.* in the county of *M.*, open, accompanied with written directions to *B.* to forward it to *A.* for publication. Query, whether this was evidence to go to the jury of an actual publication in *L.* *Rex* v. *Burdett, Bart.*, *T.* 1 *G.* 4. 717

LIBERTY,

See Escape.

LIEN.

1. A house of public entertainment in *London*, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in *London*. *Thompson* v. *Lacy, H.* 60 *G.* 3. and 1 *G.* 4. Page 283

2. Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for freight, took a bill of exchange in payment, and, though he objected to it at the time, afterwards negotiated it: Held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods. *Horncastle and Another* v. *Farran, E.* 1 *G.* 4. 497

LIMITATION OF ACTIONS,

See Constable.

LIMITATIONS, STATUTE OF.

1. Where, in a deed between defendants and a third person, defendants acknowledged, within six years, the existence of a debt, and the plaintiffs were wholly strangers to the deed: Held, this was sufficient to take the case out of the statute of limitations. *Mountstephen* v. *Brooke, M. T.* 60 *G.* 3. 141

2. Where *A.*, under a contract to deliver spring wheat, had delivered to *B.* winter wheat, and *B.*, having again sold the same, as spring

spring wheat, had, in consequence, been compelled, after a suit in *Scotland* which lasted many years, to pay damages to the vendee, and afterwards *B.* brought an action of assumpsit against *A.* for his breach of contract, alleging as special damage, the damages so recovered: Held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract, which, in assumpsit, was the gist of the action, having occurred and become known to *B.* more than six years before that period, *A.* might properly plead actio non accrevit infra sex annos. *Battley* v. *Faulkner and Another*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 288

3. To a declaration in an action on the case founded in tort, a plea of not guilty of the grievances mentioned in declaration within six years is bad upon special demurrer. *Dyster* v. *Battye*, *H.* 60 *G.* 3. and 1 *G.* 4. 448

4. Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of *England* to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do: The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years: Held, the statute of limitations having been pleaded, that upon this form of declaration, the plaintiff was not entitled to recover.

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that upon this record such an acknowledgment was not sufficient. *Short* v. *M'Carthy*, *T.* 1 *G.* 4. Page 626

LONDON,

See CORPORATION, 5.

MANDAMUS.

A writ of mandamus to a corporation, commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied: Held, that this was a fatal objection to the writ, and might be taken after the return, or at any time before the issuing of the peremptory mandamus.

Quære, whether, in such a case, a mandamus will lie. *Rex* v. *Margate Pier Company*, *M.* 60 *G.* 3. 220

MARKET.

An act of parliament, the preamble of which recited the grant of a market, and that it was expedient that provision should be made for the better regulating of the market, and for the more easy collection of the tolls and dues payable in the market, enacted, "That it should be lawful for the owner of the market to take from all persons who should place, pitch, or expose for sale within any part of the market any fruits, &c. all such tolls as are usually collected or taken within the said market, or which are payable for or in respect of the same: Held, that the owner of the market, although not entitled at common law, to any toll, might, under this clause of the act, recover such tolls as, at the time of passing this act, were usually paid in any part of the said market; and that although the tolls then usually paid in respect of the same articles were different in different parts of the market. *The Duke*

of

of Bedford v. *Emmett*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 366

MARRIAGE SETTLEMENT,

See COVENANT, 2.

MISJOINDER.

1. A count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator. *Wigley* v. *Ashton*, *M.* 60 *G.* 3. 101

2. A count stating that defendant was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, &c. whereby an action hath accrued, &c. is not a good count in debt, and cannot be joined in a declaration with counts in debt. *Brill* v. *Neele*, *M.* 60 *G.* 3. 208

NOTICE TO QUIT,

See EJECTMENT, 2.

NOTICE OF APPEAL,

See APPEAL.

OVERSEERS.

1. Two divisions within a parish had separate overseers and separate rates, and managed their poor separately; but, at the end of every year, in making up their accounts, the overseers of the one (if they had money in hand) paid the balance over to the overseers of the other: Held, that this was in effect one joint parochial account, and that all the overseers were to be considered as joint overseers of the parish at large. Held, also, that where a payment has been made by a party, at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them till after they are out of office, it is a question proper for the jury to say, whether, under these special circumstances, the party ought not to be considered as having relied upon the sole responsibility of the overseer at whose request the payment was made. *Malkin* v. *Vickerstaff*, *M.* 60 *G.* 3. Page 89

2. The statute 55 *G.* 3. *c.* 137. *s.* 6. only prohibits churchwardens or overseers from supplying the workhouse, or the poor of the parish generally; and therefore, where an overseer, receiving an order for the relief of *J. S.*, an individual pauper, paid *J. S.* part in money, and, by the consent of *J. S.*, gave her the remainder in goods from his shop: Held, that he was not liable to the penalty of 100*l.* imposed by the act. *Proctor* v. *Manwaring*, *M.* 60 *G.* 3. 145

PARTNER.

Upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to *A.*; *A.* was informed of this, and expressly agreed to exonerate the other partner from all responsibility: Held, that these circumstances did not constitute any defence to the latter in an action by *A.* against both partners. *Lodge* v. *Dicas and Rondeau*, *T.* 1 *G.* 4. 611

PENAL ACTION,

See OVERSEER, 2. *and* EVIDENCE.

PLEADING.

1. An action at law is not maintainable upon a decree of a court of equity, for a specific sum of money founded on equitable considerations only; and therefore where

where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase money and costs: Held, that no action at law was maintainable to recover such interest and costs. *Carpenter* v. *Thornton*, *M.* 60 *G.* 3. Page 52

2. A justification in trespass, that by custom a court had, from time immemorial, been holden before the steward and portreeve of a borough, or their sufficient deputy or deputies, and that a court was holden before *C. D.*, the deputy of *A. B.*, who was then steward and portreeve: Held, that upon this plea, the two offices must be taken to have been compatible, and that the appointment of the deputy by the person holding both offices was sufficient. *Green* v. *Davies and Another*, *M.* 60 *G.* 3. 60

3. Where a plea stated that *A.* was entitled to the equity of redemption, and subject thereto, that *B.* was seised in fee, and that they by lease and release granted, &c. the premises, excepting and reserving to *A.* and his heirs, &c. a liberty of hunting, &c.: Held, that as *A.* had no legal interest in the land, there could be no reservation to him, and that this was a defective title, and not a title defectively set out, and that the plea was bad in substance. *Moore* v. *The Earl of Plymouth*, *M.* 60 *G.* 3. 66

4. A count in assumpsit against husband and wife, who was administratrix, with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator. *Wigley* v. *Ashton*, *M.* 60 *G.* 3. 101

5. A conviction stated, that plaintiff having been brought before a magistrate on an information charging him with having unlawfully returned without a certificate to a parish from which he had been removed, and that upon that occasion he confessed himself guilty: Held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to shew in his defence that he did not return in a state of pauperism. *Mann* v. *Davers*, clerk, *M.* 60 *G.* 3. Page 103

6. A plea to quo warranto stated, that an immemorial court-leet was in part holden in the morning, and in part in the evening, and that the custom had been to elect the mayor at the morning court, which burgess had been accustomed to be sworn into office at the evening court by the steward or his deputy. The replication denied the mode of election; and there was also an issue, "not duly sworn." At the trial it appeared, that, in addition to the custom set out in the plea, it had been usual for the leet jury to present, in writing, the candidate who had most votes at the morning court, to be sworn in by the steward at the evening court; but they had no control over the poll: Held, that this was a mere ministerial act, on their part, and that it was no essential part of the custom, and need not be stated on the record. *Rex* v. *Rowland*, *M.* 60 *G.* 3. 120

7. Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him. *Cannan* v. *Bryce*, *M.* 60 *G.* 3. 179

8. A count stating that defendant

was

was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, &c. whereby an action hath accrued, &c., is not a good count in debt, and cannot be joined in a declaration with counts in debt. *Brill* v. *Neele, M.* 60 *G.* 3. Page 208

9. By a bill of lading the captain was to deliver the goods for the consignor, and in his name to the consignee. At the time of the shipment the consignee had no property in the goods: Held, that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and that, although the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship. *Sargent* v. *Morris, H.* 60 *G.* 3. and 1 *G.* 4. 277

10. Where *A.* under a contract to deliver spring wheat had delivered to *B.* winter wheat, and *B.* having again sold the same as spring wheat, had in consequence been compelled, after a suit in *Scotland,* which lasted many years, to pay damages to the vendee; and afterwards *B.* brought an action of assumpsit against *A.* for his breach of contract, alleging as special damage the damages so recovered: Held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract, which in assumpsit was the gist of the action, having occurred and become known to *B.* more than six years before that period, *A.* might properly plead actio non accrevit infra sex annos. *Battley* v. *Faulkner, H.* 60 *G.* 3. and 1 *G.* 4. 288

11. A trespasser having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading upon the latent wire communicating with the gun, and thereby letting it off. *Ilott* v. *Wilkes, H.* 60 *G.* 3. and 1 *G.* 4. Page 304

12. A constable acting under a warrant commanding him to take the goods of *A.*, takes the goods of *B.*, believing them to belong to *A.*: Held, that he was entitled to the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 8., and that an action against him must be brought within six calendar months. *Parton* v. *Williams, H.* 60 *G.* 3. and 1 *G.* 4. 330

13. Where *A.* being possessed of certain premises for a term of years, assigned part of them over to *B.* for the residue of his term, with a covenant for quiet enjoyment, and *B.* afterwards assigned them over to *C.*: Held, that *C.* having been evicted by *J. S.*, the lessor of *A.*, for a breach of covenant committed by *A.* previously to the assignment to *B.*, might maintain an action against *A.* upon the covenant for quiet enjoyment, on the ground that there was a privity of estate between *A.* and *C.*; secondly, the declaration having set out the indenture from *A.* to *B.*, in which it was recited that *J. S.*, by indenture, demised to *A.* the premises, and it afterwards appearing on the face of the declaration that *J. S.* had entered and ejected *C.* from the premises for a forfeiture: Held, that the Court might, particularly after verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact; thirdly, when part of the special damage laid in the declaration did not fall strictly within

within the covenant alleged to be broken, it is to be presumed, after verdict, that the jury were directed at the trial not to take that part into their consideration. *Campbell* v. *Lewis*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 392

14. A plea of discharge, under the insolvent debtors' act, is no bar to an action of trespass for mesne profits, even though accruing before the discharge. *Lloyd* v. *Peell*, *H.* 60 *G.* 3. and 1 *G.* 4. 407

15. In an action upon a bill of exchange with several indorsements, by a plaintiff who had paid the bill under protest for the honour of one of the indorsers, it was held sufficient, even upon special demurrer, to state that he had paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last indorsee. *Cox* v. *Earle*, *H.* 60 *G.* 3. and 1 *G.* 4. 430

16. To a declaration in an action on the case founded in tort, a plea of not guilty of the grievances mentioned in the declaration within six years, is bad upon special demurrer. *Dyster* v. *Battye*, *H.* 60 *G.* 3. and 1 *G.* 4. 448

17. Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, *in substance* as follows; and then set out the libel with inuendoes: Held, that this was bad in arrest of judgment. *Wright* v. *Clements*, *E.* 1 *G.* 4. 503

18. A plea in bar in replevin stated, that divers sums of money amounting to a certain sum, had been, from time to time, duly assessed and rated upon the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which defendant, as landlord, was liable to bear in respect of the rent: Held, that this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued, or was accruing. *Stubbs* v. *Parsons*, *E.* 1 *G.* 4. Page 516

19. Upon an indictment for an assault upon *E. E.*, it is sufficient to prove that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, *E. E.* the elder and *E. E.* the younger. *Rex* v. *Peace*, *E.* 1 *G.* 4. 579

20. The 21 *Jac.* 1. *c.* 7. provides, that an alehouse-keeper suffering *inhabitants* of the parish to tipple, may be convicted on the oath of one witness; and the 1 *Car. c.* 4. extends the same penalty to the case of *strangers*, but requires proof by two witnesses: Held, therefore, that a conviction stated to be on the oath of one witness against an alehouse-keeper, for permitting persons to tipple in his alehouse, was bad, for not stating whether those persons were inhabitants or strangers. *Rex* v. *Dove*, *E.* 1 *G.* 4. 596

21. It is no ground of error, upon a judgment of an inferior court, that the plaint was levied before the cause of action accrued.

In assumpsit, the defendant pleaded that the promises were made by him jointly with another, and issue was taken upon that fact. The jury by their verdict found that the defendant promised, without stating whether he promised alone or jointly with another: Held, that this verdict was bad, because it did not distinctly pronounce upon the issue. *Bishop* v. *Kaye*, *E.* 1 *G.* 4. 605

22. Upon the dissolution of a partnership it was agreed between the partners that one of them should take upon himself to discharge a

debt

debt to *A.*; *A.* was informed of this, and expressly agreed to exonerate the other partner from all responsibility: Held, that these circumstances did not constitute any defence to the latter, in an action by *A.* against both partners. *Lodge* v. *Dicas and Rondeau*, *T.* 1 *G.* 4. Page 611

23. Declaration in assumpsit stated, as a breach, that the defendant did not diligently and sufficiently make search at the bank of *England*, to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before the action brought, although it was not discovered by the plaintiff till within the six years: Held, the statute of limitations having been pleaded, that upon this form of declaration the plaintiff was not entitled to recover.

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that upon this record such an acknowledgment was not sufficient. *Short* v. *M'Carthy*, *T.* 1 *G.* 4. 626

24. Where a bill of exchange, payable at the house of *A.*, had been there presented for payment and dishonoured, and the acceptor afterwards remitted to *A.* a sum of money, for the purpose of enabling him to pay the dishonoured bill, and also another of less value, and *A.*, in answer, stated the fact of the bill having been dishonoured, but added that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill: Held, that the holder of the original bill could not maintain an action against *A.*, there being no privity between them. *Yates* v. *Bell*, *T.* 1 *G.* 4. Page 643

25. Declaration in trover against husband and wife stated that the defendants converted the property to their own use: Held, sufficient after verdict. *Keyworth* v. *Hill and Wife*, *T.* 1 *G.* 4. 685

26. Certain policies of insurance belonging to *A.* had been deposited by him as a security for a debt of 800*l.* at a banker's; *B.*, who was acquainted with these circumstances, afterwards, at the desire of *A.*, expressly undertook to take the policies and to settle with *H. W.*, and to pay in the amount which he might receive at the banker's to *A.*'s account there; upon this undertaking the policies were given to him, and upon them he received the sum of 949*l.*; *A.* having become bankrupt, and being then indebted to *B.* in a larger sum, the latter refused to pay over the money so received: Held, that the assignee of *A.* could not (even with the assent of the banker) maintain any action against *B.* for the breach of his undertaking. *Chalmers* v. *Page*, *T.* 1 *G.* 4. 697

27. Declaration for a libel concerning the plaintiff in his profession as an attorney. The libel began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in a court of law. Held, after verdict for the defendant, that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.

Quære,

he was occupied during *all the time* he was at *Clifton*, in the object for which he went thither. *Abbott* C. J. dissentiente. *Randall* v. *Gurney*, *M.* 60 *G.* 3. Page 252

5. The Court, in the exercise of its summary jurisdiction over its officers, have authority to order an attorney, (who had refused, on the ground of misconduct, to take back an apprentice, who had run away from his service,) to return to the parents of such apprentice a reasonable part of the premium received with him. *Ex parte Prankerd*, *M.* 60 *G.* 3. 257

6. To a bill, filed in vacation, a plea in abatement may be put in after the first four days of the following term. *Holme* v. *Dalby*, *M.* 60 *G.* 3. 259

7. Judgment of non pros. must be signed within twelve months from the return of the writ. *Cooper* v. *Nias*, *M.* 60 *G.* 3. 271

8. Declaration contained 98 counts, upon as many promissory notes for a guinea each. The Court ordered all the counts, but one, to be struck out of the declaration, upon the defendant's undertaking to permit all the other notes to be given in evidence, upon the account stated, and to bring no writ of error. *Carmack* v. *Gundry*, *M.* 60 *G.* 3. 272

9. A member of parliament had given a bond with two sureties, conditioned for the payment of the sum to be recovered in the action, pursuant to 4 *G.* 3. *c.* 33., and, before trial, became bankrupt. The Court refused to order the bond to be cancelled. *Hunter* v. *Campbell*, M. P., *M.* 60 *G.* 3. 273

10. Several years having elapsed after judgment obtained, the plaintiff brought an action upon the judgment. After judgment had been signed in this action, the defendant sued out a writ of error upon the first judgment: Held, that the plaintiff might, notwithstanding, take out execution on the second judgment. *Bishop* v. *Best*, *M.* 60 *G.* 3. Page 275

11. The fact of a cause being in the written list at nisi prius, is notice to the attorney that it may be tried at any time in the course of the day; and, therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court granted a new trial, only on payment of costs. *Fourdrinier* v. *Bradbury*, *H.* 60 *G.* 3. and 1 *G.* 4. 328

12. Under circumstances, the Court will allow an indictment only to be quashed on terms such as the naming of the prosecutor, &c. *Rex* v. *Glenn*, *H.* 60 *G.* 3. and 1 *G.* 4. 373

13. An arrest in the city of *London*, on a bill of *Middlesex*, is irregular, even though it took place on the verge of the county of *Middlesex*, if there be no dispute as to the boundaries. *Hammond* v. *Taylor*, *H.* 60 *G.* 3. and 1 *G.* 4. 408

14. The writ of habeas corpus at common law, although a writ of right, is not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit: *Quære*, whether under the stat. 31 *Car.* 2. *c.* 2., which only applies to cases where the application is made to a Judge in vacation, the writ be grantable of course. *Hobhouse's Case*, *H.* 60 *G.* 3. and 1 *G.* 4. 420

15. Under the statute of the 8 *Anne*, *c.* 14., the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at

any time while the goods or the proceeds remain in his hands; and the Court, upon motion, ordered the same to be paid to the landlord, even where the notice was given, after the removal of the goods from the premises. *Arnitt* v. *Garnett*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 440

16. The Court will permit a suggestion to be entered on the record, for the purpose of carrying the trial of a misdemeanour into an adjoining county, where there appears a reasonable ground on the affidavits for believing that a fair and impartial trial cannot be had in the county where the venue is laid; and the suggestion need not state the facts from whence such inference is to be drawn. *Rex* v. *Hunt*, *H.* 60 *G.* 3. and 1 *G.* 4. 444

17. An affidavit to hold to bail, which states that defendant is indebted to plaintiff as drawer of a bill of exchange, is not sufficient, unless it is also stated that the bill is due. *Edwards* v. *Dick*, *E.* 1 *G.* 4. 495

18. Where defendant was arrested on the 22d *November*, and special bail was put in in *Michaelmas* term, and perfected in *Hilary* term, a judgment of non pros, signed in *Hilary* vacation, is irregular. *Brandon* v. *Henry*, *E.* 1 *G.* 4. 514

19. In an action against a member of parliament, two persons became sureties, in a bond conditioned for the payment of such sum as should be recovered, with costs. The cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he came a bankrupt. Having suffered a term to elapse, after obtaining his certificate, without pleading it, the Court refused to let him plead it as of the former term, except on condition of dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client. *Duff* v. *Campbell*, *E.* 1 *G.* 4. Page 577

20. Where only circumstances of strong suspicion are stated in affidavits, on which a rule for a criminal information is moved, it is not sufficient, unless the deponents also add their belief that the party against whom the application is made, acted from corrupt motives. *Rex* v. *Williamson*, *E.* 1 *G.* 4. 582

21. *Semble*, that a party who is subpœnaed as a witness to attend the assizes, is guilty of a contempt, by neglecting to attend, although the cause be not called on for trial. *Barrow* v. *Humphreys*, *E.* 1 *G.* 4. 598

22. A defendant may be committed to the custody of the marshal, upon a special original. *Selig* v. *Leidersdorff*, *E.* 1 *G.* 4. 601

23. The Court will allow a copy of the articles of clerkship to be enrolled, where the original articles are lost, and the party may be then admitted an attorney. *Ex parte Clarke*, *E.* 1 *G.* 4. 610

24. The Court will not stay proceedings in an ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid. *Doe dem. Williams* v. *Winch*, *E.* 1 *G.* 4. 602

25. Where a sheriff, with the knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods, by virtue of a writ of fi. fa., without retaining a year's rent, he will be liable to the landlord for it, although no specific notice has been given to him by the landlord. *Andrews* v. *Dixon*, *Esq.*, *T.* 1 *G.* 4. 645

26. The Court will not grant a writ of habeas corpus to bring up a prisoner under sentence of imprisonment

sonment for a misdemeanor, to enable him to shew cause against a rule for a criminal information. *Rex* v. *Parkyns*, *T.* 1 *G.* 4. Page 679

27. In covenant by lessor against lessee upon a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages for the actual injury sustained instead of the increased rent, the Court will not refuse the plaintiff a new trial, on the ground that the verdict was consistent with justice; secondly, the Judge having expressly directed the jury to find damages to the amount of the increased rent; the Court granted the new trial without payment of costs. *Farrant* v. *Olmius*, *T.* 1 *G.* 4. 692

28. In an action brought against the sheriff for money levied under a fi. fa. without any previous demand, the Court will stay the proceeding, upon payment of the sum levied, without costs. *Jefferies* v. *Sheppard, Esq.*, *T.* 1 *G* 4. 696

29. Where several notices on the same bail were given, the Court will compel the defendant to pay the costs incurred by the plaintiff in consequence of such notice, *Aldiss* v. *Burgess*, *T.* 1 *G.* 4. 759

PRESCRIPTION.

A prescriptive right to a public towing-path on the banks of a navigable tide-river, is not destroyed in consequence of that part of the river adjoining the towing-path having been converted by act of parliament into a floating harbour, although the towing-path was thereby subject to be used at all times of the tide; whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation: Held, secondly, that the prescription was not destroyed by a clause in the act of parliament, whereby the undertakers of the work were authorised to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for any injury he may sustain by enlarging the then towing-path, or otherwise. *Rex* v. *Tippett*, *M.* 60 *G.* 3. Page 193

PRINCIPAL AND AGENT.

1. The solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained:" Held, they were personally liable. *Burrell* v. *Jones and Another*, *M.* 60 *G.* 3. 47

2. A factor has an authority to sell for money, but not to barter; and therefore, where a factor bartered the goods of his principal no property passed, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only. *Guerreiro* v. *Peile*, *T.* 1 *G.* 4. 616

PROHIBITION,

See Bankruptcy, 2.

PROMISSORY NOTES,

See Evidence, 4.

PROMOTIONS, p. 1. 484, 485.

RATE,

See County Rate.

1. A tenement situate in the king's

dock-yard, deriving a benefit from public sewers, and occupied by an officer of government, who paid no rent, is liable to be rated to the sewers. *Netherton* v. *Ward*, *M.* 60 *G.* 3. Page 21

2. Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of *B.*: Held, that a rate on the proprietor of those dues for their whole amount in the parish of *B.*, stated to be for the river tonnage, could not be considered as a rate on that part of the river locally situate within the parish of *B.*, but as a rate upon the parts of the river situate as well within as without the parish, and that it could not therefore be supported: Held, also, that 41 *G.* 3. *c.* 23. *s.* 1. does not give the Court of K.B. the power of amending a poor rate. *Rex* v. *Milton, M. T.* 60 *G.* 3. 112

RECTOR.

The ecclesiastical court has jurisdiction, ratione loci, over the order and proceedings of vestry meetings held in a church; and, therefore, where a rector had libelled in that court a parishioner, for preventing him from presiding as chairman at such a meeting, a prohibition was refused.

The minister of the parish has a right to preside at all vestry meetings. *Wilson* v. *M'Math, M.* 60 *G.* 3. 241

REQUESTS, COURT OF.

See Practice, 3.

REVOCATION.

Where a testator, having devised copyhold lands to *A.* for life, with different remainders over, and having surrendered them to the uses of his will, afterwards, in contemplation of marriage, conveyed his estates to trustees and their heirs, to secure a jointure for his intended wife, and subject to a term of ninety-nine years for that purpose, to the use of himself in fee, and subsequently surrendered his copyhold lands to these uses: Held, that this did not amount to a total revocation of his will, but that the devisee took the copyhold land subject to the charge created by the settlement. *Vawser* v. *Jeffery, H.* 60 *G.* 3. and 1 *G.* 4. Page 462

SETTLEMENT — *by Yearly Hiring.*

1. A pauper, in consideration of weekly wages, agreed to serve *T. S.*, a bricklayer, for three years; but, in case he should neglect his master's business, or lose any time on his own account, in any one week during the first year, then that *T. S.* should deduct from his weekly wages in proportion, and *T. S.* agreed that he would pay wages in proportion to any over-work which the pauper might do in any one week. There were similar stipulations for the second and third years of the term; and it was also agreed, that in case they could not work through the severity of the weather in any one year, in the winter time, then that *T. S.* should pay no wages during that time, but should permit the pauper to employ himself in any other business whatever: Held, that these were express exceptions in the contract, and that the pauper, by serving a year under it, did not gain a settlement. *Rex* v. *The Inhabitants of Edgmond, M.* 60 *G.* 3. 107

SETTLE-

SETTLEMENT — *by taking Tenement.*

2. The statutes of 8 & 9 *W.* 3. *c.* 11. and 13 & 14 *Car.* 2. *c.* 12. *s.* 1. are in pari materiâ, and must receive a similar construction; and therefore, where a pauper, in addition to house and land, had "agisted" three cows in the fields of his landlord for two or three months, but no positive contract for such agistment was proved: It was held, that the sessions might properly infer that this was "taking a lease of a tenement," within the 9 & 10 *W.* 3. *c.* 11., so as to discharge a certificate, although the value of the agistment, *if computed only for the time of the actual occupation,* was not sufficient, if added to the house and land, to make up the value of 10*l.* *Rex* v. *Inhabitants of Croft, M.* 60 *G.* 3. Page 171

SETTLEMENT — *by Hiring and Service.*

1. In settlement by hiring and service, the pauper is settled where his place of rest is; and therefore, where a servant, who drove the mail cart had a bed provided for him by the year at *N.*, where he rested every night during four or five hours in the middle of the night, and afterwards returned back in the morning to his master's house at *M.*, and usually went to bed in his own exclusive room for about two hours: Held, that his place of rest was at *M.*, and that his settlement was there also. *Rex* v. *Inhabitants of Mildenhall, H.* 60 *G.* 3. and 1 *G.* 4. 374

2. Where a pauper, being settled by parentage in *A.*, at the age of thirteen years hired and served for a year in *A.*, and afterwards, when he was sixteen years old, returned to and lived with his father's family until he became of age: Held, that having acquired a settlement of his own in it, he did not follow the settlement of his father subsequently gained in another parish, whilst the pauper continued to reside with him. *Rex* v. *Inhabitants of Bleasby, H.* 60 *G.* 3. and 1 *G.* 4. Page 377

SETTLEMENT — *by Apprenticeship.*

1. Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, and the master having consented to it, and all having agreed to part, the apprentice went away; but the indenture, which was in the hands of a third person, was never applied for nor given up: Held, that the apprenticeship was not put an end to by this agreement, although the master said that he would have given up the indenture if he had had it in his possession at the time, and afterwards refused to take back the apprentice. Secondly, where an unstamped indenture of apprenticeship recited that a premium of 12*l.* had been paid, but added, that it was paid out of a charitable donation fund belonging to the parish; and the master being called, proved that the premium had been paid by the parish officers, who told him at the time of paying it that it was charity money: Held, that the fact of payment being proved, the recital in the indenture, and the declaration of the parish officers, were not admissible in evidence, so as to bring the case within the exception in the 44 *G.* 3. *c.* 98. *s.* 190., and that the indenture being unstamped was void. Semble, that a charitable donation fund belonging to a parish, is a public charity within such exception,

tion. *Rex* v. *Inhabitants of Skeffington, H.* 60 *G.* 3. and 1 *G.* 4. Page 382

2. A parish apprentice and his master, both being on the permanent staff of the local militia, in consequence of that circumstance resided together with his master, and continued to serve him in the parish of *B.* for forty days: It was held that this residence was sufficient, and that he thereby acquired a settlement in *B.*, notwithstanding they were both under the controul of their superior officers during the whole time. *Rex* v. *Inhabitants of Chelmsford, H.* 60 *G.* 3. and 1 *G.* 4. 411

SESSIONS.

The sessions have no jurisdiction, under 55 *G.* 3. *s.* 51. *s.* 16., to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and, therefore, where a county-treasurer, in obedience to such an order, made the payment, and that payment was afterwards, by an order of sessions, allowed in his accounts, the Court of K. B. quashed so much of the order of sessions as allowed that item: *Quære*, whether the sessions have, under the 55 *G.* 3. *c.* 51. *s.* 16., a power to make any compensation to the clerk of the peace. *Rex* v. *Williams*, *M.* 60 *G.* 3. 215

SEWERS,

See RATE.

SHERIFF,

See ESCAPE *and* PRACTICE.

1. Two writs of fi. fa., at the suit of different plaintiffs, were issued against one defendant, the goods were not more than sufficient to satisfy the first execution. The officer under the second writ continued in possession until the goods were sold by the sheriff. The defendant then obtained a rule for setting aside the first execution; and pending that rule, there were conferences between all the parties. The rule, however, was made absolute, and the sheriff was ordered to pay the defendant the proceeds of the levy. The sheriff having so paid the money, without having applied to the Court for relief, and without having given any notice to the plaintiff in the second execution, was held liable to him for that amount, in an action of false return of nulla bona. *Saunders and Others* v. *Sheriff of Middlesex*, *M.* 60 *G.* 3. Page 95

2. Where a sheriff, with the knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods, by virtue of a writ of fi. fa., without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord. *Andrews* v. *Dixon, Esq.*, *T.* 1 *G.* 4. 645

SLAVE TRADE.

A foreigner, who is not prohibited from carrying on the slave trade by the laws of his own country, may, in a *British* court of justice, recover damages sustained by him in respect of the wrongful seizure by a *British* subject of a cargo of slaves on board of a ship then employed by him in carrying on the *African* slave trade. *Madrazo* v. *Willes, H.* 60 *G.* 3. and 1 *G.* 4. 353

SOLDIER,

See EVIDENCE, 2.

SPRING GUNS,

See TRESPASS.

STAMP,

800*l.* in making banks, afterwards sold his lands, without reserving to himself or taking any notice in the conveyance of the reimbursement above mentioned; and the commissioners having subsequently determined the amount of the reimbursement: Held, that the purchaser, and not *J. S.*, was entitled to receive it. *King, Esq.* v. *The Proprietors of Witham Navigation*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 454

3. A factor has an authority to sell for money, but not to barter; and, therefore, where a factor bartered the goods of his principal, no property passed, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only. *Guerreiro* v. *Peill*, *T.* 1 *G.* 4. 616

4. *A.* agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon; about the expiration of that time *A.* rode the horse, and gave directions as to its treatment, &c., but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away: Held, that there was no acceptance of the horse within the meaning of the statute of frauds. *Tempest* v. *Fitzgerald*, *T.* 1 *G.* 4. Page 680

WILL.

A testator being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse: Held, that it was on these facts properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court refused to disturb the verdict, and supported the will. *Doe, dem. S. Perkes,* v. *E. Perkes, E.* 1 *G.* 4. 489

WITNESS,

See Practice, 4.

END OF THE THIRD VOLUME.

Printed by A. Strahan, Law-Printer to His Majesty,
Printers-Street, London.

STAMP,

See Evidence, 8.

STOCKJOBBING,

See Assumpsit, 1.

TRESPASS.

A trespasser having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off. *Ilot* v. *Wilkes*, *H.* 60 *G.* 3. and 1 *G.* 4. Page 304

TOLL,

See Canal. Market.

TROVER.

Declaration in trover against husband and wife stated that the defendants converted the property to *their* own use: Held, sufficient after verdict. *Keyworth* v. *Hill and Wife*, *T.* 1 *G.* 4. 685

USURY.

1. Where a builder, having taken ground on a building lease at the ground-rent of 108*l.*, assigned over his lease to *A.* for a sum considerably exceeding the then value of the premises, and at the same time took a lease from *A.* at an increased rent of 395*l.*, and containing the same covenants for building as the original lease, together with a stipulation of being allowed to repurchase the lease at the same sum for which it was assigned by him to *A.*: Held, that under these circumstances, it was properly left to the jury to say whether this was a purchase or an usurious loan; and the jury having found it to be the latter, the Court refused to disturb the verdict. *Doe, dem. Grimes*, v. *Gooch*, *T.* 1 *G.* 4. Page 664

VENDOR AND VENDEE.

1. Where a vendee verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares, (then in vendor's possession, constituting part of a larger quantity in bulk,) to remain in vendor's possession till called for; and the agent, on his return home, measured the twelve bushels, and set them apart for the vendee. Held, that this did not amount to an acceptance by the latter, so as to take the case out of the 17th section of the statute of frauds. *Howe* v. *Palmer*, *H.* 60 *G.* 3. and 1 *G.* 4. 321
2. A local drainage act provided, that the owners and proprietors of lands, (*by and at whose expence certain banks should be made for the purposes of the drainage*,) their heirs and assigns, should be *reimbursed* such expences, or such share thereof as should be ascertained by certain commissioners appointed under the act; and a subsequent act, which imposed an additional tax upon those lands, provided that such tax should not be payable until the repayment of such of the above expenses as *the owners and proprietors of the said lands for the time being*, should make appear to the satisfaction of the commissioners to have been necessarily expended in making banks. The act also contained clauses, whereby tenants for life or in tail were especially enabled to borrow money, and to charge the lands with it, for the purpose of defraying the expences of making banks under these acts. *J. S.*, who had expended 800*l.*